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By A. C. FREEMAN.

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OREGON. — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**; (34) **75**; (35) **76**; (36) **78**; (37) **82**; (38) **84**; (39) **87**; (40) **91**; (41) **93**; (42) **95**.

• **PENNSYLVANIA.** — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176 Pa. St.) **53**; (177 Pa. St.) **55**; (178 Pa. St.) **56**; (179, 180 Pa. St.) **57**; (181 Pa. St.) **59**; (182 Pa. St.) **61**; (183, 184 Pa. St.) **63**; (185 Pa. St.) **64**; (186 Pa. St.) **65**; (187 Pa. St.) **67**; (188 Pa. St.) **68**; (189 Pa. St.) **69**; (190 Pa.

St.) **70**; (191 Pa. St.) **71**; (192 Pa. St.) **73**; (193 Pa. St.) **74**; (194 Pa. St.) **75**; (195 Pa. St.) **78**; (196 Pa. St.) **79**; (197 Pa. St.) **80**; (198 Pa. St.) **82**; (199 Pa. St.) **85**; (195, 200 Pa. St.) **86**; (201 Pa. St.) **88**; (202 Pa. St.) **90**; (203, 204 Pa. St.) **93**.

RHODE ISLAND. — (15) **2**; (16) **27**; (17) **33**; (18) **49**; (19) **61**; (20) **78**; (21) **79**; (22) **84**; (23) **91**; (24) **96**.

SOUTH CAROLINA. — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**; (45) **55**; (46) **57**; (47) **58**; (48) **59**; (49) **61**; (50) **62**; (51) **64**; (52) **68**; (53) **69**; (54) **71**; (55) **74**; (56, 57) **76**; (58) **79**; (59) **82**; (60, 61) **85**; (62) **89**; (63) **90**; (64) **92**; (65) **95**.

SOUTH DAKOTA. — (1) **36**; (2) **39**; (3) **44**; (4) **46**; (5) **49**; (6) **55**; (7) **58**; (8) **59**; (9) **62**; (10) **66**; (11) **74**; (12) **76**; (13) **79**; (14) **86**; (15) **91**.

TENNESSEE. — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**; (105) **80**; (106) **82**; (107) **89**; (108) **91**.

TEXAS. — (68) **2**; (69; 24 Tex. App.) **5**; (70; 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77; 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**; (94) **86**; (95) **93**; (41, 42, 43 Tex. Cr. Rep.) **96**.

UTAH. — (13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**; (21) **81**; (22) **83**; (23) **90**; (24) **91**; (25) **95**.

VERMONT. — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**; (73) **87**; (74) **93**.

VIRGINIA. — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**; (98) **81**; (99) **86**; (100) **93**.

WASHINGTON. — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**; (24) **85**; (25) **87**; (26) **90**; (27) **91**; (28, 29) **92**; (30) **94**; (31) **96**.

WEST VIRGINIA. — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**; (47) **81**; (48) **86**; (49) **87**; (50) **88**; (51) **90**; (52) **94**.

WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**; (106) **80**; (107, 108) **81**; (109) **83**; (110) **84**; (111) **87**; (112) **88**; (113) **90**; (114) **91**; (115) **95**; (116) **96**.

WYOMING. — (3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**; (8) **80**; (9) **87**.

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(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v. MASSEY.

[136 Ala. 156, 33 South. 896.]

EJECTMENT—Title—Evidence.—If a party in a statutory action of ejectment tenders an abstract of the title upon which he will rely, in compliance with the statute, and on the trial is allowed, without objection from his adversary, to introduce evidence in support of title or claim of title other than that specified in his abstract, he is entitled to go to the jury on the title which his evidence tends to support, and may recover upon such title if proved. (p. 18.)

ADVERSE POSSESSION—Minerals.—If a person goes into possession of land under a claim which does not include the minerals therein, his possession of the surface is not adverse to the true owner of the minerals, unless he does some act indicating that he claims the minerals. (p. 18.)

EJECTMENT.—Mining Rights include incorporeal hereditaments which lie in grant and not in seisin and cannot be recovered in an action of ejectment. (p. 19.)

T. G. Jones, for the appellant.

Lane & White, for the appellee.

¹⁵⁸ McCLELLAN, C. J. Section 1531 of the Code provides that when a party in an action of ejectment or in the statutory action in the nature of ejectment tenders an abstract of the title or titles upon which he will rely for recovery or defense, as the case may be, he shall on the trial be confined to such title or titles. We are of the opinion, however, that when the party is in point of fact not confined to the title stated in the abstract which he tenders, but is allowed without objection from his adversary to adduce evidence in support of title or claim of title other than that specified in his abstract, he is entitled

to go to the jury on the title which his evidence tends to support, though it be not the title stated in ¹⁵⁹ response to the demand for an abstract of the title or titles upon which he will rely. Hence, our conclusion in the case before us, that although the defendant in the abstract he tendered under the statute stated only a claim to the land under contract of purchase from the Alabama and Chattanooga Railroad Company, yet, if he without objection adduced evidence tending to show title by adverse possession, he was entitled to have such evidence submitted to the jury, and to recover upon it in the event they found he had been in adverse possession of that interest in the land which plaintiff claimed for the period of ten years. The interest which plaintiff sought to recover was the mineral deposits in and upon the soil. We find no evidence in the record of any adverse possession of this interest by the defendant. To the contrary, it is shown without controversy that the defendant held and claimed under the contract between him and the Alabama and Chattanooga Railroad Company which expressly reserved the mineral interest. It is true that the defendant testified that he at one time told the agent of the company that he repudiated this contract, but it none the less clearly and without conflict appears that he all along held under this writing and claimed only that interest in the land which the company undertook therein to convey to him, having subsequent to the time of his alleged repudiation of this contract made a payment under it, had it recorded, continued to hold it and set it forth in the abstract tendered by him on the trial of this case. The question involved is not one of the severance vel non of the general and the mineral interest in land by a conveyance, but whether he claimed the mineral interest while in possession of the land, for without such claim his possession of the surface would not be adverse possession of the minerals, or, more accurately, his possession of the land, being under a claim which did not embrace the minerals, was not adverse to the true owner as to the minerals. That he "never mined any coal or other mineral, or prospected for any coal or other mineral" on the land is admitted. On this state of case, the plaintiff was entitled to the affirmative charge with hypothesis as to the minerals or mineral interest in and upon the land. But it does not follow that the court was under a duty ¹⁶⁰ to give the charge which the plaintiff requested and the refusal of which is the subject of the only assignment of error. The charge requires a verdict, not only for the mineral interest in the land, but also for the "min-

ing rights" therein or appurtenant thereto. These mining rights are, or at least must include, incorporeal hereditaments, lying in grant but not in seisin, such as rights of way over the surface, the right to dig and drive slopes and entries, and the like, rights of an intangible nature, incapable of being delivered by the sheriff or of possession by the owner, rights for a denial of or interference with which an action at law for damages would lie, and which would be considered by courts of equity, but in the nature of things cannot be recovered in an action of ejectment. It is upon these considerations that we rest our condemnation of the charge and our approval of the circuit court's action in refusing it.

Affirmed.

A Prescriptive Title to Minerals beneath the surface of the earth is not acquired, it has been held, by the occupation of the land for tillage under a claim of title: *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355. But see *Delaware etc. Canal Co. v. Hughes*, 183 Pa. St. 66, 63 Am. St. Rep. 743, 33 Atl. 568. If the title to the surface has been severed from the title to the mineral, the possession of the surface does not carry with it the possession of the mineral: *Catlin Coal Co. v. Lloyd*, 180 Ill. 393, 72 Am. St. Rep. 216, 54 N. E. 214.

Ejectment will lie only for things whereof the possession may be delivered, and will not lie for a mere license, an incorporeal hereditament, a right of way, or an easement: *Hancock v. McAvoy*, 151 Pa. St. 460, 31 Am. St. Rep. 774, 25 Atl. 47. But it has been held that a grant of the right to quarry limestone constitutes a foundation for ejectment: *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317, 3 S. E. 710.

NASH v. SOUTHERN RAILWAY COMPANY.

[136 Ala. 177, 33 South. 932.]

NEGLIGENCE—Contributory.—Drunkenness never excuses a person for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Drunkenness does not exempt a person from responsibility for contributory negligence. (p. 21.)

CONTRIBUTORY NEGLIGENCE is a Matter of Defense, the onus of proving which is on the defendant, except when the plaintiff's evidence relieves the former from discharging it. (p. 22.)

RAILROADS—Passengers—Expulsion from Train.—A railway conductor having reasonable regard for the safety of the life and limb of a drunken and boisterous passenger has a right to eject him from the train, at a proper place and under suitable conditions. (p. 22.)

RAILROADS—Negligence—Proximate Cause.—The voluntary departure of a passenger from a railway train at his destination is not the proximate cause of his death thereafter while he is a trespasser on the railroad track. (p. 22.)

RAILROADS—Negligence—Drunken Trespasser.—A railroad company is not liable for injury to, or the death of, a drunken trespasser, injured by it while upon its track, in the absence of wantonness or willful wrong in injuring him. (p. 22.)

P. Scott, for the appellant.

J. Weatherby, for the appellee.

179 HARALSON, J. The assignments of error as to counts of the complaint are to the overruling separately and severally of defendant's demurrers to the first, second, third, fifth, seventh and ninth counts, but it appears there was no judgment of the court on these demurrers. The other assignments of error relate to the action of the court in refusing to allow the plaintiff to amend the complaint by adding an additional count numbered 10, and in giving the general affirmative charge for defendant.

There were three pleas, first, not guilty, second, plea of contributory negligence to each count, to which pleas a demurrer was sustained, and the third, that the plaintiff's intestate was a trespasser or quasi trespasser on the track of defendant at the time of his injury and death, and that the injuries which caused his death were not inflicted wantonly or willfully or intentionally by the defendant or any of its employés. On motion of the plaintiff, as the judgment entry recites, that part of the plea averring that intestate was a trespasser on the track was quashed, leaving the plea averring a want of willfulness or wantonness in defendant, and issue was joined thereon. The course of the trial shows that the case was tried on the defenses that defendant was guilty of no negligence, on the plea of contributory negligence of the plaintiff's intestate, and that he was a trespasser on defendant's track, and will be reviewed on the evidence as applicable to these defenses.

In *Columbus etc. Ry. Co. v. Wood*, 86 Ala. 166, 5 South. 464, this court, through Stone, C. J., approved the doctrine thus stated by Mr. Beach: "Drunkenness is a wholly self-imposed disability, and in consequence is not to be regarded with that kindness and indulgence which we instinctively concede to blindness, or deafness, or any other physical infirmity. Trespassers go at their peril. This is settled law. Much more is it just to hold that they make themselves drunk at their peril. Disabilities,

moreover, of any kind, are a shield, and never a sword. It would be a strange rule of law that regarded a certain course of conduct negligent and blameworthy upon the part of a sober man, but that held the same conduct, on the part of the same man when intoxicated, venial and excusable. ¹⁸⁰ Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances": Beach on Contributory Negligence, sec. 492.

Again, approving this rule, the court said: "Drunkenness does not exempt a person from the responsibility of contributory negligence. If intoxication renders a person reckless or indifferent to consequences, or inadvertent or thoughtless, and he fails to exercise due care, his failure or omission will not be excused because superinduced by his intoxication. The law exacts from one intoxicated the same care and precaution to avoid injury as it would from a sober person of ordinary prudence under like circumstances": Johnson v. Louisville etc. R. R. Co., 104 Ala. 246, 53 Am. St. Rep. 39, 16 South. 76.

The evidence for the plaintiff shows, without conflict, that plaintiff's intestate, Nash, entered a passenger coach of the defendant at Bessemer without a ticket, and paid to the conductor his fare to Maylene; that when he got on the train he had a bundle with him, and it contained two bottles of whisky which were unopened, and he was very much intoxicated; that he was staggering around and boisterous, using very bad language and was hardly able to stand on his feet; that Nash told the conductor he desired to go to Maylene; that the conductor at first refused, stating that the train did not stop at that point, at which Nash became so noisy and boisterous the conductor told him if he would behave himself and be quiet, he would take him to Maylene; that intestate was not quiet, and when the train stopped at Mobile Junction, he wanted to get off there, but did not, and that some of the employes of the company stayed with him until he arrived at Gurney, seven miles this side or short of Maylene, where the witness deposing to the above facts left the train and saw no more of what occurred. This witness also stated that when he got off, Nash was still walking around over the coach talking and staggering about; that he did not seem to talk like he had sense, could stand up without assistance, but could not walk very well without it, and while on the train he did not drink anything that he saw. There ¹⁸¹ is no evidence tending to show how he got off the train, whether by himself or

with the assistance of another. The evidence tended to show that the train arrived at Maylene about 1 o'clock A. M.; that the weather was cold and the night drizzly and dark, and that another train from the south going north came along, during the night, and afterward the body of Nash was found cut in two, with the head lying between the rails opposite the depot, and other parts of the body some forty feet to the north side of the track. The bundle containing the whisky was also there found. It was shown that deceased lived at Maylene, which was a regular station but not a regular stopping-place; that there was a store there, about twenty-five or thirty yards from the depot; that a box-car with a platform in front constituted the depot, and that no night office was at the place, and no one was kept on duty at night.

Contributory negligence is matter of defense, the onus of proving which is on the defendant, except when the plaintiff's evidence relieves defendant from discharging it: *Kansas City etc. R. R. Co. v. Crocker*, 95 Ala. 412, 428, 11 South. 262.

From the evidence in this record the conduct of deceased was such as for which the conductor would have been justified in ejecting him from the train at a proper place and under suitable conditions, having reasonable regard to the safety of his life and limb: *Louisville etc. R. R. Co. v. Johnson*, 104 Ala. 241, 53 Am. St. Rep. 39, 16 South. 75, 108 Ala. 62, 19 South. 51. If the conductor had this right, there certainly was no negligence or breach of duty in allowing deceased to get off the train at the point of his destination, or to assist him in departing. The one or the other was done, but which does not appear. The injury did not happen on the train, but after he got off. His departure from the train, under the evidence, cannot be regarded as the natural and proximate cause of his death, or as connected with it, except as he himself connected it by his voluntary intoxication, and the suit is not brought for the killing of the intestate, disconnected with his condition and what occurred on the train. It also appears that when killed intestate was on the track of the company, and was a trespasser thereon. The company was under no duty, so far as the evidence discloses, to look after and ¹⁸² guard him through the night, and to keep him from off the track: *McClelland v. Louisville etc. Ry. Co.*, 94 Ind. 276.

The cases cited by plaintiff's counsel and to which we have referred, were cases where the deceased was expelled from the train for drunkenness or improper conduct, at a place and under con-

ditions which were dangerous, rendering such ejection at the time and place unlawful.

The only evidence offered was by the plaintiff, and after it was all in she proposed to add another count to the complaint, numbered 10, to which defendant objected, "because said count is subject to demurrer, to the effect that it shows that plaintiff's intestate was a trespasser on the track of the defendant, but fails to allege or show that the injuries of which he died were wantonly or willfully inflicted, and the same is indefinite and uncertain; and because the count proposed as an amendment has no evidence to support it."

The proposed amendment, after the evidence closed, by the addition of count 10 was subject to demurrer, and was not sustained by evidence. There was, therefore, no error in disallowing it: *Beavers v. Hardie*, 59 Ala. 570.

The affirmative charge was properly given for defendant.

Affirmed.

Intoxication as contributory negligence is the subject of a monographic note to Louisville etc. R. R. Co. v. Johnson, 25 Am. St. Rep. 39-47. It is said that the law exacts from one voluntarily intoxicated the same care and precaution to avoid injury as from a sober person: *Johnson v. Louisville etc. R. R. Co.*, 104 Ala. 241, 53 Am. St. Rep. 39, 16 South. 75. A railroad company has the right to eject a drunken and disorderly passenger from its train: *Louisville etc. R. R. Co. v. Logan*, 88 Ky. 232, 21 Am. St. Rep. 332, 10 S. W. 655; *Johnson v. Louisville etc. R. R. Co.*, 104 Ala. 241, 53 Am. St. Rep. 39, 16 South. 75; *Roseman v. Carolina Cent. R. R. Co.*, 112 N. C. 709, 34 Am. St. Rep. 524, 16 S. E. 766. But this right must be reasonably exercised, so as not to inflict wanton or unnecessary injury or needlessly place the passenger in circumstances of peril: *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601; *Haug v. Great Northern Ry. Co.*, 8 N. Dak. 23, 73 Am. St. Rep. 727, 77 N. W. 97. The liability of the company in case a drunken passenger is run over after being expelled from a train is considered in the monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 829.

The Burden of Proving Contributory Negligence on the part of the plaintiff is generally held to be on the defendant. Some authorities, however, seem to take a contrary view: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28, 9 South. 303; *Day v. Boston etc. R. R. Co.*, 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, and cases cited in the cross-reference note thereto.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v. LEE.

[136 Ala. 182, 33 South. 897.]

RAILROADS—Injury to Livestock from Fright—Burden of Proof.—A railroad company has a right to make required signals at a public crossing and all the usual noises incident to the running and moving of its trains, and the burden of proof is on one who seeks to recover for the death of a horse caused by fright at escaping steam from a railroad engine, to show that such emission of steam or the giving of a signal was unnecessary to a skillful operation of such engine. (p. 24.)

Action to recover for the alleged negligent killing of plaintiff's horse, caused by his fright at escaping steam from defendant's railroad engine. Judgment for plaintiff, and defendant appealed.

J. M. Falkner and W. I. Grubb, for the appellant.

J. W. Bush, for the appellee.

¹⁸⁴ TYSON, J. Unless we indulge, in this case, the presumption of wrongdoing on the part of those in charge of the locomotive and impose the burden upon the defendant of acquitting itself of the act complained of, the plaintiff should not have been allowed to recover. That no such presumption can be indulged and that the burden of proof was upon the plaintiff to show that the emission of the steam was unnecessary to a skillful operation of the engine, is distinctly held in *Stanton v. Louisville etc. R. R. Co.*, 91 Ala. 382, 8 South. 798. It is there said: "As the railroad corporation has the right to use its track and make the required signals at a public crossing, and all the usual noises incident to the running and moving of its trains,
¹⁸⁵ it was incumbent on the plaintiff to show the 'blowing off steam' and the making of the noise complained of was unnecessary." Applying this principle to the facts of this case, there being no evidence tending in the remotest degree to show that the letting off the steam that frightened plaintiff's horse was unnecessary, the plaintiff has not discharged the burden of proof that was upon him. We cannot judicially know that the volume of steam emitted was unnecessary or that it was necessary to emit steam at all. For aught we may know, its emission was entirely and absolutely necessary to successfully give to the wheels of the engine a rotary motion backward, such being the

operation of the engine at the moment the steam complained of was emitted.

The judgment must be reversed and one will be here rendered for the defendant.

Railroad Companies cannot ordinarily be held responsible for horses taking fright at the appearance, movement, or noise of the cars, except when the conduct complained of in the management thereof is wanton or malicious: *Terre Haute etc. Ry. Co. v. Yant*, 21 Ind. Ap. 486, 51 N. E. 732, 69 Am. St. Rep. 376, and cases cited in the cross-reference note thereto.

DRAKE v. SCOTT.

[136 Ala. 261, 33 South. 873.]

SALES—Cash on Delivery.—If goods are sold for cash on delivery, the payment and delivery are concurrent acts, and the title to the property does not pass without payment of the price, unless such payment is waived. (p. 25.)

P. Scott, for the appellant.

Estes & Smith, for the appellee.

262 HARALSON, J. "Where there is a sale of goods, to be paid for in cash on delivery, payment and delivery are concurrent acts. In such case, payment is a condition precedent to passing title to the vendee. If delivery is made without demanding payment, or under circumstances showing no expectation of immediate payment, the condition is waived, and the title passes; but, if the goods are put into the possession of the buyer, on the understanding or agreement that he will pay for them immediately, and he fails or refuses to do so, the seller may recover the goods": *Shines v. Steiner*, 76 Ala. 458; *Harmon v. Goetter*, 87 Ala. 325, 6 South. 93; *Benjamin on Sales*, 6th ed., secs. 1, 320, and note 4, p. 298.

The facts in this case show without conflict that the contract for the sale of the chattels sued for, to the defendant by the plaintiff, was for cash to be paid on delivery, the payment being a condition precedent to passing the title to defendant.

Affirmed.

When a Sale is Made for Cash, the title ordinarily remains in the vendor until payment is made, but payment may be waived as a condition precedent to the vesting of title: *Scharff v. Meyer*, 133 Mo.

428, 54 Am. St. Rep. 672, 34 S. W. 858. See, also, Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; National Bank v. Chicago etc. R. R. Co., 44 Minn. 224, 20 Am. St. Rep. 566, 46 N. W. 342, 560; Southwestern Freight etc. Co. v. Standard, 44 Mo. 71, 100 Am. Dec. 255; Chapman v. Lathrop, 6 Cow. 110, 16 Am. Dec. 433.

TAYLOR v. CROOK.

[136 Ala. 354, 34 South. 905.]

BILLS OF REVIEW—Estates of Decedents.—On a bill to review a decree allowing a credit on the settlement of an administrator's account for services of an attorney, the question whether the evidence supports the finding of fact on which the decree is based is not open for consideration, and merely the question as to whether the item was a legal charge under the facts may be considered. (p. 27.)

ESTATES OF DECEDENTS—Statute of Limitations.—Adversary proceedings to subject the lands of a decedent to the payment of debts, whether contracted by him or his personal representative, and though for costs of administration, whether the creditor is such personal representative or a third person, must be begun within the period of limitation or the debt is barred. (p. 29.)

ESTATES OF DECEDENTS—Probate of Will—Attorney's Fee—Statute of Limitations.—A claim against the estate of a decedent for an attorney's fee in probating the will of the decedent accrues on the probate of the will, and adversary proceedings against the estate to subject the lands of the decedent to the payment of such debt must be commenced within the period of limitation thereafter. (p. 30.)

ESTATES OF DECEDENTS—Proceeding to Sell Land.—A petition by an administrator asking for a reference to ascertain the value of the professional services of an attorney in obtaining the probate of the will of the decedent is not a proceeding to have the lands of the estate sold to pay the value of such services ascertained to be due. (p. 30.)

ESTATES OF DECEDENTS—Debts—Statute of Limitations. Lands descending to heirs or devisees of a decedent can be charged for debts against the estate only by proceedings of an adversary character setting up the nature of the debt and seeking a decree for the sale of such lands for its payment, and such proceeding must be commenced within the period of the statute of limitations. (p. 30.)

ESTATES OF DECEDENTS—Debts—Attorney's Fee—Statute of Limitations.—An attorney's fee for services in probating a will is not a debt against the estate of the decedent in the nature of costs, against which the statute of limitations does not run in favor of the heirs and devisees. (p. 31.)

ESTATES OF DECEDENTS—Debts—Attorney Fees.—If an executor employs an attorney to have a will probated, the value of such attorney's services is not in the first instance a debt or charge against the real estate of the decedent, but is a charge against the executor. (p. 32.)

ESTATES OF DECEDENTS—Debts—Statute of Limitations.

Proceedings to charge the lands or proceeds of lands of a decedent for any debt incurred by him or by his executor or administrator must be inaugurated against the estate in due form, as to parties and declared purpose within the period of the statute of limitations. (p. 33.)

ESTATES OF DECEDENTS.—Claim for Attorney Fees in probating a will is not a liability against the land of the decedent except when such land has been sold for the payment of his debts. (p. 34.)

ESTATES OF DECEDENTS—Debts—Conversion of Realty into Personalty.—A conversion of the lands of a decedent authorized by his will for the purpose of division, does not make it personalty so far as it involves its liability for the payment of debts. (p. 34.)

APPEAL—Dismissal—Estoppel.—A person who obtained the dismissal of an appeal on the ground that the decree from which it was taken was not final, is estopped to afterward claim as against a bill of review, that such decree was final. (p. 35.)

Whitson & Graham, for the appellants.

Knox, Bowie & Dixon, for the appellees.

368 TYSON, J. Counsel have practically argued but a single question. This question involves the propriety of **369** the chancellor in allowing H. P. Heflin a credit on the settlement of the administration of J. T. Heflin of \$13,608.24, as a fee to J. T. Heflin as attorney in probating the will of the deceased, Gantt. This bill of review was filed for the purpose of vacating that decree. This proceeding cannot involve an inquiry into the value of the services rendered by J. T. Heflin, for that would require an examination of the evidence upon which the chancellor bases his decree, which is not permissible in bills of review. The point is, whether or not the items as disclosed by the proceedings which we are at liberty to consider, conceding them duly proved as to amount, were a legal charge against the estate of Edward Gantt at the time it was allowed.

The record sought to be reviewed shows that Gantt died in 1867, leaving a will in which four persons were named executors, three of whom refused to propound the will for probate; but the fourth, Samuel Leeper, authorized J. T. Heflin, who was an attorney, to propound it and to represent him in the probate of it.

After a prolonged contest, the will was admitted to probate on the eighteenth day of April, 1872. The fee claimed is for services rendered in the contest and probate of the will which terminated on that date. Leeper died before the contest was decided, and J. T. Heflin, who performed the services as attorney, qualified as administrator with the will annexed, on the thirteenth day of May, 1872, and had the administration moved

into the chancery court, on a bill filed in May, 1879, on which a decree was rendered on the 17th of February, 1881, assuming jurisdiction—after which time the administration of the estate proceeded in that court. By decree of the court made in May, 1883, the administrator was ordered to make a partial settlement, which was made in 1886, the register's report showing debits to the amount of \$13,155.61, and credits to the amount of \$8,595.14, leaving a balance in the hands of the administrator of \$4,560.47. On the 16th of October, 1883, the administrator filed a petition in the cause, setting out his services as attorney in and about probating the will, and asking a reference to the register to ³⁷⁰ report on the value of such service. No parties were made to this petition, nor did it in any way seek a decree for the sale of the lands of the deceased testator for the payment of the alleged debts. The court entered a decree requiring the register to report on the claim, and the register made one report embracing the partial settlement above referred to and the matter of the fee. The report was set aside in August, 1887, and a new report ordered because the evidence as to the value of the attorney's fee was not reported. The same report was afterward made with the testimony and was confirmed by the chancellor on October 5, 1887. This report fixed the fee at \$4,000, with interest from April, 1872, making a total of \$8,720, but the item was not embraced in those of the debits or credits of the administrator in the partial settlement. On the hearing before the register the parties appeared in opposition to the allowance of the claim. Exceptions were submitted against its allowance by the register to the chancellor, who overruled them and allowed the claim. From his rulings an appeal was prosecuted to this court, which was dismissed at the instance of H. P. Heflin, the administrator of J. T. Heflin, who had died pending the appeal in 1889, on the ground that the decree of the chancellor was not final. On the return of the case, the administration proceeded. One Crook qualified as administrator de bonis non of Gantt and revived the suit against H. P. Heflin as administrator of J. T. Heflin. H. P. Heflin, administrator of J. T. Heflin, filed his answer and accounts for a final settlement of his intestate's administration, in which he claimed as a credit to his intestate the payment of said fee allowed by the previous order of the court. The opposing parties appeared and contested the claim anew. The register held that he was concluded by the previous decree, and allowed the claim in full as a credit to H. P. Heflin, administrator, etc.—the allowance being with interest

from April, 1872, compounded from the 16th of September, 1887, the date of the allowance of the claim by the previous report confirmed by the court October 5, 1887, amounting in the aggregate to the date of the accounting, 22d of September, 1894, to the sum of \$14,635. Exceptions ³⁷¹ were reserved to this report, but were overruled by the chancellor, who rendered a decree over, after exhausting all the funds in the hands of the original administrator, against Crook as administrator de bonis non for a large amount, requiring him to pay the same.

The two main questions presented are: 1. Was the claim a debt against the estate of Edward Gantt? 2. Was it barred by the statute of limitations?

We will answer the last question first. It is clearly the law in this state that on the death of the ancestor, his estate takes a dual course as to title—the personalty vests in the executor or administrator, while the realty vests in the heir or devisee. As to the realty, the personal representative has only a power, to be exercised in the mode, manner and within the time prescribed by law. It is equally well settled that the heir or devisee cannot be deprived of his estate under this power without adversary proceedings commenced within the period of the statute of limitations. And it matters not whether the creditor is the personal representative or a third person. In either case, the lis pendens against the heir or person representing the heir must be commenced within the period of the statute. If the creditor is a third person, he must proceed against the administrator within the period, after which he may charge the heir on failing to collect his judgment out of the representative or sureties on his bond. If the creditor is the administrator or executor, he must in like manner proceed to assert his claim against the holder of the title within the period of the statute: *Scott v. Ware*, 65 Ala. 183; *Steele v. Steele*, 64 Ala. 439, 38 Am. Rep. 15; *Teague v. Corbitt*, 57 Ala. 543; *Trimble v. Fariss*, 78 Ala. 266; *Cary v. Simmons*, 87 Ala. 529, 6 South. 416; *Warren v. Hearne*, 82 Ala. 554, 2 South. 491; *Chandler v. Wynne*, 85 Ala. 308, 4 South. 653; *Miller v. Irby*, 63 Ala. 484; *Bond v. Smith*, 2 Ala. 660; *Grimball v. Mastin*, 77 Ala. 559. And money arising from the sale of land is regarded as land as to these matters: *McDonald v. Carnes*, 90 Ala. 149, 7 South. 919; *Chaney v. Chaney*, 38 Ala. 35; *Williamson v. Mason*, 23 Ala. 488; *Teague v. Corbitt*, 57 Ala. 543.

In this case, J. T. Heflin's debt accrued, if a valid ³⁷² claim, on the probate of the will in 1872. He took no steps to charge

the lands with the payment of the same within the period of six years. His right, therefore, was barred as to the lands. The record, the pleadings and reports of the register show that all the assets in his hands were lands or the proceeds of lands, and that all of the present assets are of the same character. No steps were taken in the administration of the estate by J. T. Heflin until the bill was filed to remove the administration into the chancery court. This, we have shown, was on the 28th of May, 1878. But this was not a proceeding against the land for the payment of the debt. The next step was the petition to the chancellor filed by the administrator to have his claim ascertained on a reference for that purpose. This was on the 16th of October, 1883, more than eleven years after its accrual. This petition cannot be regarded as a proceeding to have the lands sold for its payment. The debt might easily be established and authorize an appropriation of the personal property to its payment, without affecting the realty. The heirs or devisees must be charged by proceedings of an adversary character setting up the debt and seeking a decree for a sale of the lands for its payment: *Garnett v. Garnett*, 64 Ala. 263. The decree of the chancellor allowing the claim is founded solely upon the report of the register made upon this petition. If it be said that the parties appeared and defended and for this reason they cannot object to the form of the proceeding, the answer is, that they set up the invalidity of the claim which was overruled by both the register and the chancellor. The error, therefore, is plain. The ruling being that the heirs and devisees may have their land sold to pay a debt due on a quantum meruit, on proceedings commenced more than eleven years after the accrual of the right of action upon it.

It is argued, however, that this debt is in the nature of costs against which the statute of limitations does not run, and that a succeeding administrator could pay the same and claim credit therefor. The case of *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590, is cited to support this ³⁷³ contention. In that case, it is said any reasonable costs and expenses incurred by an executor in the honest endeavor to give effect to the will are a proper charge on the estate in his hands, and that a successor in office may pay such expenses and charge the estate therewith. This statement was made particularly with reference to two items of credit claimed by the administratrix who had succeeded the executor, but neither item was an expense of administration so incurred and both were disallowed. One was an at-

torney's fee on the contest of the will, which the court said would have been allowed if the previous executor had employed the attorney. It must be obvious that this announcement of the law, so far as attorneys' fees are concerned, was unnecessary to the decision of the point before the court. The attorneys in that case never having been employed by the executor, but by the settling administratrix before qualifying to protect her individual interest, no question was before the court as to the right of a trustee to impose a liability on the estate generally. Of course, any proper cost or expense incurred by a trustee is a charge in his favor on the estate in his hands, and he will never be deprived of the estate until his charges are paid, and no limitations would run against the items of charge while there was a live trust in existence in the hands of such trustee.

But an executor or administrator does not hold lands in trust; the title goes to the heir or devisee and the representative has only a power to have them subjected to debts of the estate of the testator or intestate, but not for costs of administration. The heir or devisee has the right to plead the statute of limitations against all debts of every character. The proceeding to subject lands to any liability, whether to creditors anterior to the administration, or to the administrator for costs of administration, must in all cases, be commenced against the owner of the land within the period of limitations. There must be, as we have said, an adversary proceeding within that time in due form, setting out the liability, making proper parties and claiming the relief desired. No such proceeding was instituted by ³⁷⁴ Samuel Leeper; in fact, he never qualified as executor. His claim, therefore, against the land, supposing it one for which the land was liable, was barred. And if J. T. Heflin, as succeeding administrator, had in fact paid this item to a third person or to himself, it would be no legal credit to him or his successor as against the lands or proceeds of lands, unless within the period of the statute proceedings were duly commenced and prosecuted against the devisees to a judicial subjection of the lands to the specific claim. Expenses incurred by an administrator in a particular service, if chargeable against the lands, cannot as against the heir stand on a higher level than debts of the ancestor. If the representative is not content to look to the personal estate in his hands, he must proceed in due time against the land, to make it liable, so that proper defenses, if they exist, may be made. He cannot continue an administration for nearly thirty years and then ask an allowance, with interest for that

long time, against the heir for expenses in probating the will, even if the lands were chargeable with such an expense, which is not the case unless the administration must be exercised over the lands for the payment of the debts of the ancestors created by him: *Beadle v. Steele*, 86 Ala. 421, 5 South. 169; *Sermon v. Black*, 79 Ala. 507; *Garrett v. Garrett*, 64 Ala. 263. It is clear to our minds that the claim was barred by the statute of limitations.

The other point is equally clear. Neither Edward Gantt, nor anyone authorized to contract for him, or the estate, dealt with J. T. Heflin. Samuel Leeper, at best, employed him to have the will probated. Leeper was, at most, a quasi trustee having a right to employ a lawyer to perform the service, and on paying him, to ask an allowance against the trust. The rule against allowing persons dealing with trustees to proceed directly against the trust is founded on public policy. The public interest requires that trustees shall incur the liability with the risk of its being disallowed, for cause, when they come to settle their accounts. This secures their good faith and keeps a salutary check upon their liberality in dealing with trust estates. And, besides, to allow ³⁷⁵ a double liability and right in every creditor, to proceed against either or both, as he may prefer, would produce the utmost confusion: *Jones v. Dawson*, 19 Ala. 672; *Steele v. Steele*, 64 Ala. 439, 38 Am. Rep. 15. The rule, therefore, is wise which makes the trustee liable to the person he deals with. There is no hardship in this. The creditor knows exactly where he stands before he makes the venture and cannot complain at the result. The trustee knows his position before he incurs any liability. The case cannot be improved by the statute of 1873, now section 4183 of the Code, since that statute has no retroactive operation: *Steele v. Steele*, 64 Ala. 439, 38 Am. Rep. 15. But if it had, it would not apply, since Leeper was not a trustee, executor or administrator, who are the only persons provided for, and if he was, the case is not within the categories of the original statute or of the code as to form or substance: *Munden v. Bailey*, 70 Ala. 74; *Askew v. Myrick*, 54 Ala. 30. The law on this subject is well expressed by the court in the cases of *Jones v. Dawson*, 19 Ala. 672, *Steele v. Steele*, 64 Ala. 439, 38 Am. Rep. 15, and *Blackshear v. Burke*, 74 Ala. 243. We quote from the latter: "A trustee, express or implied, cannot, in the absence of express power conferred upon him by his contracts or engagements, impose a liability upon the trust estate. If he make a contract which is beneficial to the estate, the cred-

itor, or person with whom he contracts, has no equity to charge the estate, unless he be insolvent, which must be shown by the exhaustion of legal remedies against him, and the estate is indebted to him. In that event, a court of equity may subrogate the creditor to the right of the trustee to charge the trust estate." This principle is sustained by many cases: *Mulhall v. Williams*, 32 Ala. 489; *Askew v. Myrick*, 54 Ala. 30; *Mosely v. Norman*, 74 Ala. 423; *Munden v. Bailey*, 70 Ala. 74; *Daily v. Daily*, 66 Ala. 266; *Grimball v. Mastin*, 77 Ala. 559; *Taylor v. McCall*, 71 Ala. 53.

It may be said, and it is, in fact, argued with ability, that the case of *Coopwood v. Wallace*, 12 Ala. 790, is decisive of this point in this case. The case under consideration is not brought within the rule announced in that case, if that was the rule of this court, and if the statute ³⁷⁶ of limitations was out of the way, since there is no allegation that *Leeper* was insolvent. But the case of *Coopwood v. Wallace*, 12 Ala. 790, must be regarded as overruled by the decisions of this court, notwithstanding the unqualified overruling of it in *Jones v. Dawson*, 19 Ala. 672, was mollified, if not qualified, by the dictum of the court in *Mulhall v. Williams*, 32 Ala. 489, and alluded to arguendo in *Askew v. Myrick*, 54 Ala. 30, as an established exception to the general rule in favor of the legal profession. There can be no doubt that the case of *Coopwood v. Wallace*, 12 Ala. 790, has been practically repudiated and completely overwhelmed by many subsequent cases affirming the general rule, of which *Steele v. Steele*, 64 Ala. 439, 38 Am. Rep. 15, may be taken as an example, and confirmed by statute (Code, sec. 4183), providing for the particular cases in which and the conditions upon which trust estates may be liable in the first instance, to persons dealing with trustees, which must be considered as excluding all other cases. There certainly exists no reason why the claims of attorneys should stand on any higher grounds than other services of like necessity to a trust estate. It may be entirely true as stated in *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590, and *Hearin v. Savage*, 16 Ala. 286, that proper costs and expenses of a previous administration may be paid by a succeeding administrator, and that he will be allowed a credit therefor in his settlement. He, in such case, becomes, as it were, an assignee of the claim, and he must establish it as a proper credit to the first administrator, or charge upon the estate which he could

have been compelled to pay as representing the trust. And though it may be conceded that if only personal property in possession of the administrator was involved, the question of allowance would come up on his final settlement, without prejudice from the statute of limitations, it would be entirely different as to real estate. The proceeding to charge land or the proceeds of land for any liability incurred by the ancestor or by an administrator or executor, must, as we have shown, be inaugurated in due form, as to parties and declared purpose, within the limits of the statute of limitations.

³⁷⁷ If J. T. Heflin, then, was subrogated to the rights of Leeper, and if Leeper could have asserted his claim against the whole estate, including lands, and if Heflin would have all the rights of retainer, the case would not be bettered. This, because retainer by an executor or administrator cannot be exercised against land or its proceeds until the claim is established, after adversary proceedings commenced within the period of limitations. If J. T. Heflin had all these equities in support of a valid claim, there was no difficulty in his proceeding in equity, as soon as he qualified and without removing the general administration, against the devisees to establish the claim and for the sale of the land for its payment. Never having done so, his administrator cannot have a credit against the realty or a decree over for the debt, however meritorious it may have been. It appears, however, that this claim is for expenses of administration, which we have seen is not a liability against the land except where the lands have to be sold for the payment of debts. The conversion authorized by the will was for the purpose of division only. For all other purposes the property remains real estate: *Allen v. Watts*, 98 Ala. 392, 11 South. 646; *Johnson v. Holifield*, 82 Ala. 127, 2 South. 753; *Moore v. Campbell*, 102 Ala. 449, 14 South. 780.

The only remaining question is whether on this bill of review, these errors are apparent. It is true, in this proceeding, that we are not permitted to look into the evidence to see whether or not it supports any conclusion of the court or fact shown by other portions of the record. We are bound to take the facts apparent upon the record as true, and the only question is, whether, the facts being true, the decree is free from error, that is, can be supported. What we may look at is expressed in one of the leading cases—*McDougald v. Dougherty*, 39 Ala. 428—where it is said: “We adopt the rule that . . . it is permissi-

ble to consult all the facts which are apparent in the pleadings, in the process and in its service, in orders, reports confirmed and opinions and decrees": *Smyth v. Fitzsimmons*, 97 Ala. 458, 12 South. 48; *Banks v. Long*, 79 Ala. 319; *P. & M. Bank v. Dundas*, 10 Ala. 667.

³⁷⁸ The original bill in the cause in which the decree was rendered stated that the estate of the testator consisted almost entirely of lands, and the report of the register on which the decree was rendered contains an admission that all the assets were and are lands or their proceeds. The petitions and reports in reference to the allowance of the claim show that it was for services rendered by J. T. Heflin as an attorney for Samuel Leeper in procuring the probate of the will, which terminated in April, 1872. Every essential fact, therefore, to show the error of the decree in allowing H. P. Heflin, as administrator of J. T. Heflin, a credit and decree over against the proceeds of real estate on account of the services to Leeper is apparent in the record at which we must look. This decree is inconsistent with the law as applied to these facts and, therefore, cannot stand.

The decree cannot be supported on the idea that the confirmation of the first report of the register fixing the amount of the fee was final. If it was final, it was no ascertainment of the liability of the land or its proceeds for its payment. There was no pleading alleging such liability or claiming such relief. The petition was filed on one day and on the next the decree of reference was made, without parties being made or an opportunity to defend, requiring the register to report the amount of the fee. The report and decree confirming it did not fix or purport to fix a liability on land. The fee did not even enter into the partial settlements as an item of credit. And if it had gone into such settlement, it would be open to the charge of error as a credit against the lands.

But independent of this, the appellants appealed to this court to reverse the decree of confirmation and the appellee, who now claims that it was a final decree, induced this court to dismiss the appeal because the decree was not final. He will not now be permitted to say that the decree was final: *Smith v. Hodson*, 2 *Smith's Lead. Cas.* 138; *Jones v. McPhillips*, 82 Ala. 102, 2 South. 468; *Hill v. Huckabee*, 70 Ala. 183; *Caldwell v. Smith*, 77 Ala. 157; *McQueen's Appeal*, 104 Pa. St. 596, 49 Am. Rep. 592; *Bigelow on Estoppel*, ³⁷⁹ 5th ed., 556, 683; 7 *Ency. of Law*, 1st ed., 19-22.

The bill is sufficient in law and the demurrer to it should have been overruled, and a decree will be here entered reversing the decree and overruling the demurrer.

Reversed and rendered.

Haralson, J., not sitting.

Dowdell, J., dissenting.

An Attorney Employed by an Administrator of an estate is held to have no claim against it for his services, although they may have inured to its benefit. He must look to the administrator: *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292, 35 S. W. 212. See, too, *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 54 Am. St. Rep. 131, 19 South. 777; *In re Douges' Estate*, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786; *Patton v. Ludington*, 103 Wis. 629, 74 Am. St. Rep. 910, 79 N. W. 1073; *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310; note to *Schlicker v. Hemenway*, 52 Am. St. Rep. 122. But it is held that an attorney who renders services to an executor named in a will before he qualifies, is entitled to collect his fees in the same manner as other claims against the estate are collected: *Baker v. Cauthorn*, 23 Ind. App. 611, 77 Am. St. Rep. 443, 55 N. E. 963.

A Claim Against the Estate of a Decedent not presented to the court within the time limited by statute becomes forever barred: *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343. See, also, *Easton v. Somerville*, 111 Iowa, 164, 82 Am. St. Rep. 502, 82 N. W. 475; *Brock v. Kirkpatrick*, 60 S. C. 322, 85 Am. St. Rep. 847, 38 S. E. 779.

PECK-HAMMOND COMPANY v. HEIFNER.

[136 Ala. 473, 33 South. 807.]

CONTRACTS—Breach—Damages—Profits.—If persons enter into a contract by which one agrees to furnish labor and materials or erect a structure for the other, and, having begun, such other wrongfully prevents him from completing the contract as agreed, although he is at all times ready, able and willing to perform it, he is entitled to recover, for the breach of the contract, the profits that would have accrued to him from its full performance. (p. 37.)

R. Rushton, for the appellant.

474 McCLELLAN, C. J. The Peck-Hammond Company, of the one part, and F. P. Heifner, of the other, entered into an unconditional contract by the terms of which the former was to furnish and put in place a warm air heating apparatus in a house which the latter was under contract to build for a third party, and the latter was to pay therefor the sum of five hundred and thirty dollars. This contract, without cause therefor on the part of the Peck-Hammond Company, was repudiated by Heif-

ner and its performance by the former was thereby prevented, though the company was at all times ready, able and willing to perform it. This seems to us a clear case for recovery by the company from Heifner of the value to it of the contract and not merely the amount of expense incurred by it in the way of performing its part of the contract. The company was entitled to recover, in other words, the profits that would have accrued to it from a full performance of the contract: 1 Sedgwick on Damages, sec. 182; 8 Am. & Eng. Ency. of Law, 632 et seq.; Ramsey v. Holcombe, 21 Ala. 567; George v. Cahawba etc. R. R. Co., 8 Ala. 234; Danforth v. Tennessee etc. R. R. Co., 93 Ala. 614, 11 South. 60; Bonifay v. Hassell, 100 Ala. 269, 14 South. 46; Worthington & Co. v. Gwin, 119 Ala. 44, 24 South. 739.

The evidence adduced in the city court, where the case ⁴⁷⁵ was tried without a jury, showed that the Peck-Hammond people had expended twenty-five dollars toward the performance of the contract before Heifner refused to allow them to proceed with its execution, that the full performance of the contract would have entailed upon them the further expense of two hundred and eighty-three dollars and sixty-eight cents. Deducting the aggregate of these sums, viz., three hundred and eight dollars and sixty-eight cents, from the contract price, viz., five hundred and thirty dollars, and the balance, viz., two hundred and twenty-one dollars and thirty-two cents, is the profits as upon full performance which the plaintiff was entitled to recover with interest. Of course, the defendant had no concern with the expense incurred by plaintiff in securing the contract, the seventy-nine dollars and fifty cents commissions paid to its agent, Hoover.

The judgment of the city court awarding only twenty-five dollars damages must be reversed, and a judgment will be here rendered for plaintiff for the sum of two hundred and twenty-one dollars and thirty-two cents, with interest from July 7, 1898, when defendant unequivocally declined to allow plaintiff to put in the apparatus.

Reversed and rendered.

The Principal Case is supported by Upstone v. Weir, 54 Cal. 124; O'Connell v. Main etc. Hotel Co., 90 Cal. 515, 27 Pac. 373; Taylor v. Trustees of Poor, 1 Penne. (Del.) 555, 43 Atl. 613; James H. Rice Co. v. Penn Plate Glass Co., 88 Ill. App. 407; Kimball Bros. v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041; Hauser etc. Co. v. Tate, 105 Ky. 701, 49 S. W. 475; Leonard v. Beaudry, 68 Mich. 312, 36 N. W. 88; Silberstein v. Duluth News Tribune Co., 68 Minn. 430, 71 N. W. 622; American Contract Co. v. Bullen Bridge Co., 29 Or. 549, 46 Pac. 138.

OATES v. BULLOCK.

[136 Ala. 537, 33 South, 835.]

FALSE IMPRISONMENT—Void Warrant.—Any person who procures the issuance of a void warrant of arrest is liable in damages to the person named therein if he is arrested under the authority it is supposed to import. (p. 39.)

FALSE IMPRISONMENT—Void Warrant.—A person who makes a proper and sufficient complaint before a magistrate for the purpose of having a warrant of arrest issued thereon for the person complained against, is not liable for false imprisonment when the magistrate, without fault on the part of the complainant, issues a paper intended to be a warrant, but which is void on its face, and the person charged is arrested and restrained of his liberty thereunder. (p. 40.)

FALSE IMPRISONMENT—Void Warrant.—If a person, after making a sufficient complaint before a magistrate charging another with a crime, by a negligent or wrongful act causes the magistrate to issue a void warrant for the arrest of such other person, it is not necessary, in order to render him liable for false imprisonment, that his negligent or wrongful act should be the sole cause of the issuance of the warrant of arrest. If the fault of the person making the complaint combines with the fault of the magistrate in issuing the warrant, the imprisonment is caused by the fault of each and both. (p. 40.)

ARREST—Void Warrant.—A paper in the form of, and intended to be, a warrant of arrest and issued as such is void unless actually signed by the magistrate issuing it. (p. 41.)

FALSE IMPRISONMENT—Arrest Under Void Warrant—Ratification.—If a person who makes an affidavit for an arrest before a magistrate has no knowledge that the latter has issued a void warrant thereon, under which the arrest is made, his employment of counsel to prosecute the person charged with crime and thus arrested cannot be construed as a ratification of the unlawful arrest under the void warrant so as to make him liable for false imprisonment. (p. 41.)

FALSE IMPRISONMENT—Evidence.—Plaintiff is entitled to show malice on the part of defendant in causing his arrest in order to enhance the damages for false imprisonment, whether malice is alleged or not, and on the other hand, defendant is entitled to show probable cause for causing the arrest in order to rebut the proof or imputation of malice. (p. 42.)

FALSE IMPRISONMENT—Arrest Under Void Warrant—Evidence.—A person sued for false imprisonment for an arrest made under a void warrant is entitled to show when the fact that such warrant had been issued came to his knowledge, to enable the jury to determine whether he had ratified the unlawful arrest by employing counsel and appearing on the day set for the trial of the person thus arrested. (p. 42.)

Pierce & Page, for the appellant.

543 McCLELLAN, C. J. Bullock is plaintiff and Oates defendant in this cause. The first count of the complaint is as follows: "The plaintiff claims of the defendant the sum of one

thousand dollars damages for maliciously causing the plaintiff to be arrested and deprived of his liberty, on a charge of moving property on which another had a claim, for five days beginning on or about November 14, 1898." The second count charges that defendant caused the plaintiff to be unlawfully arrested and for the rest is a copy of the first count. The third count is also like the first, except that it charges that defendant maliciously caused the plaintiff to be unlawfully arrested. No point was made as to the sufficiency of the complaint, and the defendant by consent pleaded "the general issue, in short, with leave to give in evidence any matter that might be specially pleaded."

The facts of the case are peculiar. Solomon was a justice of the peace. Oates brought to him a sheet of paper on a page of which was partly written and partly printed an affidavit charging Bullock with the offense of removing mortgaged property, and below the affidavit a warrant for his arrest upon said charge. There was no signature to the affidavit, nor to the jurat, nor to the warrant, but blank spaces were left on the paper for these signatures. Solomon swore Oates to the facts stated in the affidavit, then handed the sheet to Oates for his signature to the affidavit. Oates, inadvertently it may be assumed, signed the warrant, handed the paper back to Solomon, and the latter observing no other vacant space for signature signed only the jurat to the affidavit. Oates then left, and afterward the paper was given by the justice to a constable for the execution of the supposed warrant ⁵⁴⁴ which was a part of it. The constable proceeded to arrest Bullock and confined him for several days and until the day set in the supposed warrant for his trial before the justice. When that day arrived and the prisoner and the prosecutor were in the justice's court, and not before, it was discovered that the justice had not signed the warrant, and, of course, that the paper purporting to be a warrant was not in fact a warrant, but utterly void for want of the justice's signature.

It is elementary that any person who procures the issuance of a void warrant is liable in damages to the person named therein and who is arrested under the authority it is supposed to import. It is equally well settled that a person who makes a proper and sufficient complaint before a magistrate for the purpose of having a proper and sufficient warrant of arrest issued thereon for the person complained against is not liable for false imprisonment when the magistrate, without fault on the part of the complainant, in fact issues a paper intended to be a warrant but which is void on its face, and the person charged is arrested and restrained

of his liberty thereunder. Here Oates made a sufficient complaint before the justice against Bullock. His purpose and intention in making that complaint was that a valid warrant should issue thereon, and that Bullock should be arrested and held thereunder. The justice did not issue such warrant, though he, too, supposed he was issuing a valid warrant; but in fact issued a paper as a warrant and intended to be a warrant which was utterly void. It is also an elementary principle in this connection that the motives and intentions of the parties concerned in the issuance and execution of a void warrant are immaterial when the action is for damages resulting from an unlawful arrest and imprisonment; motives may be considered in measuring the damages, but not in determining the existence of the cause of action alleged. So that the inquiry of chief importance in this case is whether there was evidence upon which it was open to the jury to conclude that the defendant, Oates, though he made a sufficient ⁵⁴⁵ complaint, yet procured the issuance thereon of a void warrant, and this turns upon what is meant by procuring the issuance of the paper within the principle we have stated. The question of his motives and intentions being eliminated, it follows, in our opinion, that any wrongful act of Oates, though its wrongfulness lie only in its inadvertent and negligent character, causing the magistrate to issue a void warrant, is the procuring of its issuance by the officer. Nor need the act be the sole cause. If the fault of the prosecutor combine with the fault of the justice, the result flowing therefrom is, in legal contemplation, caused by the fault of each of them, and both. For example: Oates brought this warrant to the justice with the blank space for the statement of the offense filled out, and his conduct was in substance a request that the magistrate sign it as filled out and issue. It happened that the offense was sufficiently stated in the warrant form which Oates presented. But suppose it had not been, suppose the paper presented by Oates for Solomon's signature and issuance had not stated any offense, and Solomon in compliance with Oates' request had signed and issued it as a warrant, would there be any room for saying that Oates did not procure Solomon to sign and issue this void paper? We think not. Solomon too would be at fault, of course, but his fault would be merely consequent upon and contributory to that of Oates in the issuance of the supposed warrant. So here, it was open to the jury to find that Oates' inadvertence and negligence in signing his own name to the warrant when he should have signed only the affidavit, caused Solomon to sign

only the jurat because that was the only remaining blank space, to omit to sign the warrant and to issue it with Oates' signature to it. Such conclusion by the jury would be to find that Oates, by his inadvertent, negligent wrong in affixing his signature to the warrant, procured the issuance of the void warrant under and by the supposed authority of which the plaintiff was unlawfully arrested and restrained of his liberty. Upon these considerations, we hold that the trial court ⁵⁴⁶ properly refused the general charge requested by the defendant and also his requests numbered 5 and 6.

A paper in the form of and intended to be a warrant and issued as such is void unless it is actually signed by the magistrate issuing it. Charge 1 requested by defendant was, therefore, properly refused, and the court did not err in that part of its oral charge in which it declared "that the warrant under which the plaintiff was arested is void and conferred no authority to arrest the plaintiff": Code, sec. 5208.

It cannot be said as matter of law that Oates' negligence in signing his name to the warrant caused Solomon to issue it without his own signature. This was a question for the jury. If they failed to find a causal connection between this act of Oates and the issuance of the void warrant, then it was open to them to find that Oates did nothing toward having a warrant issued other than making the complaint. If so, the complaint being sufficient, the whole fault in issuing the paper would be that of Solomon, the justice, and for its issuance the arrest and confinement of the plaintiff under it, the defendant would not be responsible: *Chambliss v. Blau*, 127 Ala. 86, 28 South. 602, and authorities there cited. Charge 4 requested by the defendant asserts this doctrine and should have been given; and the court erred also in that part of its oral charge excepted to which declares in effect that if Oates set in motion the proceedings in which the supposed warrant was issued, i. e., made this complaint, he cannot escape liability for the issuance of a warrant without the justice's signature.

If Oates did not know that the justice had issued a warrant without signing it, nor that plaintiff had been arrested under this void writ—and the evidence afforded abundant ground for a conclusion on the part of the jury that he did not—his preparation to carry on the prosecution at the trial could not be contorted into a ratification of the plaintiff's unlawful arrest by the constable: *Burns v. Campbell*, 71 Ala. 271, 290. Charge 7 requested by the defendant should have been given.

547 Charge 2 requested by the defendant is argumentative, and gives undue prominence to a singled out fact. Of course, if Oates, through mere inadvertence, signed the warrant, there is no room for an imputation of malice to him for that act.

The complaint, as has been shown, charges in one or more counts that the defendant maliciously caused the unlawful arrest of the plaintiff. Even without such averment of malice in the complaint plaintiff would be entitled to show malice on the part of the defendant to induce the jury to give a larger measure of damages. In view of this, we think the defendant should have been allowed to prove his mortgage on certain property, and that he had probable cause for believing that plaintiff had removed it, as charged in the affidavit by which the prosecution was commenced.

The defendant should have been allowed to show when the fact that the warrant had been issued without the signature of the justice came to his knowledge. This was pertinent to the inquiry whether he had ratified the unlawful arrest by employing counsel and appearing on the day set for trial to prosecute the plaintiff.

For the errors pointed out the judgment of the circuit court must be reversed. The cause is remanded.

Sharpe, J., is of the opinion that as matter of law the defendant is not responsible for the absence of the magistrate's signature from the paper called a warrant, and dissents from so much of the majority opinion as holds the contrary. He concurs in the reversal.

False Imprisonment is the subject of a monographic note to Tryon v. Pingree, 67 Am. St. Rep. 408-427. See, also, the subsequent cases of Page v. Citizens' Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144, 36 S. E. 418; Leger v. Warren, 62 Ohio St. 500, 78 Am. St. Rep. 738, 57 N. E. 506; Bergeron v. Peyton, 106 Wis. 377, 80 Am. St. Rep. 33, 82 N. W. 291; Glazar v. Hubbard, 102 Ky. 68, 80 Am. St. Rep. 340, 42 S. W. 1114; Fukumoto v. Marsh, 130 Cal. 66, 80 Am. St. Rep. 73, 62 Pac. 303, 509; State v. McDaniel, 78 Miss. 1, 84 Am. St. Rep. 618, 27 South. 994.

McWHORTER v. BLUTHENTHAL.

[136 Ala. 568, 33 South. 552.]

PAYMENT—Application of.—If a creditor has two claims one past due and the other not, a payment made by the debtor without direction or agreement as to its application, must be applied to the debt past due. (p. 43.)

TRIAL PRACTICE.—If there is a palpable conflict in the evidence as to a material question in issue, an affirmative charge requested by defendant is properly refused. (p. 44.)

INTOXICATING LIQUORS—Sales—Recovery of Price.—Mere knowledge on the part of the seller of intoxicating liquor that the purchaser intends to sell it in violation of law, together with the fact that it is so sold, does not constitute a participation in the unlawful act so as to prevent the seller from recovering the price of the liquor. (p. 44.)

TRIAL PRACTICE—Defects in Proposed Instructions to Jurors.—Though an instruction in the form requested is not intelligible, apparently from some omission, the court is under no duty to supply the omission or to otherwise make the charge intelligible, but may refuse to charge as requested. (p. 44.)

Powell, Hamilton & Middleton, for the appellant.

Lomax, Crum & Weil, for the appellee.

571 DOWDELL, J. The question raised on the demurrer to the third plea as amended and to the sixth plea was determined on the former appeal in this case: Bluthenthal v. McWhorter, 131 Ala. 642, 31 South. 559.

There was evidence tending to show that the debt on open account from the defendant to the plaintiff was not due at the time of the alleged payment of sixty dollars. If this was true, in the absence of an agreement to that effect, the plaintiffs had no right to apply this payment as a credit on the account, but were bound to apply it on the note which was then past due: *Bobe's Heirs v. Stickney*, 36 Ala. 482. The defendant testified that when he remitted the sixty dollars to the plaintiffs the note sued on was then past due, and the indebtedness from defendant to plaintiffs on open account was not due. He also testified that in making this remittance he gave plaintiffs no direction as to the application of the payment. This being true, the law directed the application of the payment to the past due indebtedness, and evidence therefor by the defendant that he did not consent for the plaintiffs to credit the said payment on the open account, which was not due, was immaterial. No error was committed by the court in sustaining the objection to this evidence.

There was a palpable conflict in the evidence as to a material question in issue, and the affirmative charge requested by the defendant was, therefore, properly refused.

Written charge No. 3 requested by the defendant was properly refused for the same reason that plea No. 3 was held insufficient upon former appeal. Mere knowledge on the part of the plaintiffs of the purpose of the ⁵⁷² defendant to sell the liquor in violation of the prohibition law in Lowndes county, and the fact that it was sold by the defendant in violation of such law, did not, as matter of law, constitute a participation by the plaintiffs in the defendant's act.

Written charge No. 8 was properly refused. There was no evidence "that Flexner solicited or received from the defendant the whisky shown to have been sold to defendant by the invoice," etc. The charge as copied in the transcript is not intelligible; something seems to have been omitted. But charges are to be given or refused by the court in the language requested. It is not the duty or province of the court to supply the omission of words in charges asked.

Charge No. 9 requested by the defendant is faulty in the failure to hypothesize an intent on the part of the plaintiffs in connection with the acts postulated in the charge as constituting a participation by the plaintiffs in subsequent illegal sales of the liquor to the defendant. If the acts postulated were done by the plaintiffs without the purpose or intent to aid the defendant in his subsequent illegal sales, such acts in themselves and alone would not constitute a participation in such subsequent illegal sales. The charge for the reason given, if for no other, was properly refused.

There being no error in the record, the judgment will be affirmed.

APPLICATION OF PAYMENTS.*

- I. Application by the Debtor.
 - a. Right to Direct.
 - b. Effect on Creditor.
 - c. Ratification by Debtor.
 - d. Right of Action for Misapplication.
- II. Application by the Creditor.
 - a. When the Right Arises.
 - b. Must not be Inequitable.
 - c. Need not be Similar Debts.

*REFERENCES TO MONOGRAPHIC NOTES.

Application of payments: 13 Am. Dec. 505; 14 Am. Dec. 694.
Rules for computing interest where partial payments have been made: 50 Am. Dec. 287.

- d. Limitations Upon the Right.
- e. Must be Existing Debts.
- f. Dividing Payments.
- g. Rights of Third Persons.
 - 1. General Rule.
 - 2. As Agent or Trustee.
- h. Joint and Partnership Obligations.
- i. Where Payment is Derived from a Particular Fund.
- j. Where Payment is Received for a Special Purpose.
- k. Debtor Must Have Opportunity to Apply.

III. Application by the Court.

- a. Where Neither Party Applies.
- b. How the Court Acts.
- c. Oldest Debts.
- d. Secured and Unsecured Debts.
 - 1. By Lien or Mortgage.
 - 2. By Surety.
- e. Interest Bearing Obligations.
- f. Fixed and Contingent Liabilities.
- g. Debts Due and not Due.
- h. Pro rata Application.
- i. Indivisible Transactions.
- j. Particular Source.
- k. Intention of the Parties.
 - 1. Followed if Ascertainable.
 - 2. The Roman Law.
 - 3. The Debtor Favored.
 - A. Most Burdensome Debts Discharged.
 - B. Exceptions to the Rule.
 - 4. The Creditor Favored.
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 - 1. To Items First Accrued.
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 - 3. Where Two Accounts Exist.
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 - A. Change in Firm.
 - B. Change in Method of Bookkeeping.

V. Illegal and Unenforceable Demands.

- a. Illegal.
 - 1. Application by Debtor.
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 - 3. Application by Law.
 - A. Legal Items Favored.
 - B. Illegal Paid from Surplus.
- b. Unenforceable.
 - 1. Statute of Limitations.
 - A. Where Some Barred.
 - B. Where all Barred.
 - C. Application by Law.

2. Statute of Frauds, Infancy, Bankruptcy.

VI. Principal and Interest.

- a. Legal Interest.
 - 1. General Rule.
 - 2. No Choice in Debtor.
 - 3. Where Received Before Debt is Due.
 - 4. Where Several Debts Bear Interest.
 - 5. Method of Computing Interest.
- b. Usurious Interest.
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VII. Time of Application.

- a. For Debtor.
- b. For Creditor.
 - 1. Before Suit.
 - 2. Within a Reasonable Time.
 - 3. Till Verdict or Judgment.
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VIII. Bonds of Officials.

IX. Rights of Third Persons.

X. Change of Application.

- b. When Rights of Others Involved.
 - a. As Between the Parties.

XI. The Application, and How Manifested.

- a. By Debtor.
 - 1. By Circumstances.
 - 2. By Known Intent.
 - 3. What is a Sufficient Application.
 - 4. Silence of Debtor.
- b. By Creditor.

XII. Evidence of Application.

- a. Books of Account.
- b. Indorsements.
- c. Letters.
- d. Statements of Account.
- e. Recitals in Legal Instruments.
- f. Miscellaneous.
- g. Burden of Proof.

XIII. Mistake.

XIV. Voluntary and Involuntary Payments.

- 1. Voluntary Payments Defined.
- 2. Rules in Cases of Involuntary Payments.

I. Application by the Debtor.

a. Right to Direct.—No proposition of law is more universally acknowledged than that a debtor, in making a payment to a creditor to whom he owes more than one debt, may direct its application. He may apply it all to one debt, and need not apportion it pro rata among them: *Blackman v. Leonard*, 15 La. Ann. 59; and it is of no consequence that one debt may be due on a bond and the other on a simple contract: *Mayor etc. of Alexandria v. Patten*, 4 Cranch, 317. The reason for this rule is that up to the time of payment the money is the property of the debtor, and being such may be applied as he sees fit: *Baum v. Trantham*, 42 S. C. 104, 46

Am. St. Rep. 697, 19 S. E. 973; and this right of application in the debtor is recognized both by the civil and the common law: *McDonnell v. Branch Bank*, 20 Ala. 313; *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Bell v. Radcliff*, 32 Ark. 645; *Atkinson v. Cox*, 54 Ark. 444, 16 S. W. 124; *Byrnes v. Claffey*, 69 Cal. 120, 10 Pac. 321; *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *Mackey v. Fullerton*, 7 Colo. 556, 4 Pac. 1198; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; *Fairchild v. Holly*, 10 Conn. 175; *Selleck v. Sugar Hollow etc. Co.*, 13 Conn. 453; *McCartney v. Buck*, 8 Houst. (Del.) 34, 12 Atl. 717; *Lodge v. Ainscow*, 1 Penne. (Del.) 327, 41 Atl. 187; *Randall v. Parramore*, 1 Fla. 409; *Greer v. Burnam*, 71 Ga. 31; *Coleman v. Slade*, 75 Ga. 61; *Balley v. Wynkoop*, 10 Ill. 449; *Jackson v. Bailey*, 12 Ill. 159; *Hahn v. Geiger*, 96 Ill. App. 104; *Howland v. Rensch*, 7 Blackf. (Ind.) 236; *McCauley v. Holtz*, 62 Ind. 205; *Fargo v. Buell*, 21 Iowa, 292; *First Nat. Bank v. Hollinsworth*, 78 Iowa, 575, 43 N. W. 536; *Irwin v. Paulett*, 1 Kan. 418; *McDaniel v. Barnes*, 68 Ky. (5 Bush) 183; *Howard v. London Mfg. Co.*, 24 Ky. Law Rep. 1934, 72 S. W. 771; *Robson v. McKain*, 18 La. Ann. 544; *Flower v. O'Bannon*, 43 La. Ann. 1042, 10 South. 376; *Starrett v. Barber*, 20 Me. 457; *Plunmer v. Erskine*, 58 Me. 59; *McTavish v. Carroll*, 1 Md. Ch. 160; *Lee v. Early*, 44 Md. 80; *Bonaffé v. Woodberry*, 29 Mass. (12 Pick.) 456; *Richardson v. Woodbury*, 66 Mass. (12 Cush.) 279; *McDonald v. Lewis*, 42 Mich. 135, 3 N. W. 300; *Grasser etc. Co. v. Rogers*, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445; *Solomon v. Dreschler*, 4 Minn. 278; *Crisler v. McCoy*, 33 Miss. 445; *Champenois v. Fort*, 45 Miss. 355; *Beck v. Haas*, 111 Mo. 264, 33 Am. St. Rep. 516, 20 S. W. 19; *McMillan v. Grayston*, 83 Mo. App. 425; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Bean v. Brown*, 54 N. H. 395; *Oliver v. Phelps*, 20 N. J. L. 180; *Leeds v. Gifford*, 41 N. J. Eq. 464, 5 Atl. 795; *Allen v. Culver*, 3 Denio, 284; *Davis v. Fargo*, 1 Clarke Ch. (N. Y.) 470; *Seymour v. Marvin*, 11 Barb. 80; *Moose v. Marks*, 116 N. C. 785, 21 S. E. 561; *Raymond v. Newman*, 122 N. C. 52, 29 S. E. 353; *Stewart v. Hopkins*, 30 Ohio St. 502; *Trullinger v. Kofoed*, 7 Or. 228, 33 Am. Rep. 708; *Watt v. Hoch*, 25 Pa. St. 411; *Wagner's Appeal*, 103 Pa. St. 185; *Black v. Shooler*, 2 McCord (S. C.), 293; *Bell v. Bell*, 20 S. C. 34; *White v. Blakemore*, 76 Tenn. (8 Lea) 49; *Taylor v. Coleman*, 20 Tex. 772; *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857; *Robinson v. Doolittle*, 12 Vt. 246; *Ayer v. Hawkins*, 19 Vt. 26; *Chapman v. Commonwealth*, 25 Gratt. 721; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427; *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261; *Buster v. Holland*, 27 W. Va. 510; *Jones v. Williams*, 39 Wis. 300; *Johnston v. Northwestern etc. Ins. Co.*, 107 Wis. 337, 83 N. W. 641; *Tayloe v. Sandiford*, 7 Wheat. 13; *United States v. Kirkpatrick*, 9 Wheat. 720; *Jones v. United States*, 7 How. 681; *Cremer v. Higginson*, Fed. Cas. No. 3383 (1 Mason, 323); *The Mecca*, [1897] App. Cas. 286.

b. Effect on Creditor.—When the debtor has elected the debt to which he wishes a payment applied, and it is communicated to the creditor, the latter has no choice, but must follow the debtor's direction: *Atkinson v. Cox*, 54 Ark. 444, 16 S. W. 124; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; *Semmes v. Boykin*, 27 Ga. 47; *Johnson v. Johnson*, 30 Ga. 857; *Hughes v. McDougale*, 17 Ind. 399; *Wipperman v. Hardy* (Ind.), 46 N. E. 537; *Bosley v. Porter*, 27 Ky. (4 J. J. Marsh.) 621; *Hussey v. Manufacturers' etc. Bank*, 27 Mass. (10 Pick.) 415; *Durrell v. Todd*, 31 Neb. 256, 47 N. W. 862; *Goodman v. Snow*, 81 Hun, 225, 30 N. Y. Supp. 672; *Runyon v. Latham*, 27 N. C. (5 Ired.) 551; *Eylar v. Read*, 60 Tex. 387; *First Nat. Bank v. Munzesheimer* (Tex. Civ. App.), 26 S. W. 428; *The Mecca* [1897] App. Cas. 286; and this same rule applies as well to a draft as to cash: *Moorehead v. West Branch Bank*, 3 Watts & S. (Pa.) 550. Mere equitable considerations are not sufficient to allow the creditor to apply it to another debt: *City of Lincoln v. Lincoln St. Ry. Co.* (Neb.), 93 N. W. 766, citing *Life Ins. Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862; *Stewart v. Hopkins*, 30 Ohio St. 502. The application need not be made known to the creditor in person, but if communicated to his agent it is sufficient to bind him: *Kinnear v. Dilley*, 3 Willson Civ. Cas. Ct. App. (Tex.), sec. 406. Where the receipt evidences the purpose for which payment was made, it should be applied accordingly: *Stewart v. Keith*, 12 Pac. 238.

Direction by the debtor as to the appropriation of payment having been regularly given, it is regarded by law as having been so made, no matter where the creditor in fact applied it: *Reid v. Wells*, 56 S. C. 435, 34 S. E. 401; and the creditor cannot show in evidence another debt to which it might have been applied: *Patterson v. Van Loon*, 186 Pa. St. 367, 40 Atl. 495.

If the creditor may repudiate the transaction, but does not do so, he must follow the application pointed out by the debtor: *Pearl v. Clark*, 2 Pa. 350. So where the payment is made on an account not due, he need not receive it, but if he does he is bound to appropriate it according to the direction of the debtor: *Wetherell v. Joy*, 40 Me. 325. The same holds good where the creditor, acting as agent of the debtor to pay another creditor, acquiesces, and he cannot refuse to pay him, retaining, instead, the money and applying it on his own indebtedness: *Hall v. Marston*, 17 Mass. 575. In *Haynes v. Wilson*, 21 Ky. Law Rep. 1382, 55 S. W. 209, a debtor sent his creditor a treasury warrant in full payment of an account due from a third person to such creditor. The latter refused it as payment in full, but informed the debtor that it was credited upon such account. The court held that the creditor could not so apply it, as it was not in compliance with the debtor's order, and that the latter was entitled to have it credited upon his own indebtedness.

c. Ratification by Debtor.—An application otherwise than as directed may be ratified by the debtor. So where he directed pay-

ment to one note, but it was made on another, of which he was informed, and he afterward paid the balance due on such note, he was held to have ratified it, and could not subsequently object: *Citizens' Bank v. Carey*, 2 Ind. Ter. 84, 48 S. W. 1012.

d. Right of Action for Misapplication.—If the party intrusted with the payment fails to carry out the debtor's direction, he is answerable only to the debtor. So where a senior mortgagee is instructed to apply a payment by the debtor to that mortgage, if he fails it is a breach of contract between them; and a junior mortgagee cannot maintain an action against him, there being no privity: *Sims v. Lester*, 55 Ga. 620.

II. Application by the Creditor.

a. When the Right Arises.—The debtor having failed to exercise his right of appropriation, it devolves upon the creditor, and he may apply it generally to such debt as he desires: *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Bell v. Radeliff*, 32 Ark. 645; *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *Nichols v. Culver*, 51 Conn. 177; *Lodge v. Ainscow*, 1 Penne. (Del.) 327, 41 Atl. 187; *Randall v. Paramore*, 1 Fla. 409; *Holmes v. Pratt*, 34 Ga. 558; *Perry v. Bozeman*, 67 Ga. 643; *Davis etc. Co. v. Buckles*, 89 Ill. 237; *Wellman v. Miner*, 179 Ill. 326, 53 N. E. 609; *Keairnes v. Durst*, 110 Iowa, 114, 81 N. W. 238; *First Presbyterian Church v. Santy*, 52 Kan. 462, 34 Pac. 974; *Calvert v. Carter*, 18 Md. 73; *Washington Bank v. Prescott*, 37 Mass. (20 Pick.) 339; *Henry etc. Co. v. Utley*, 155 Mass. 366, 29 N. E. 635; *Blair v. Carpenter*, 75 Mich. 167, 42 N. W. 790; *Wood v. Genett*, 120 Mich. 222, 79 N. W. 199; *Solomon v. Dreschler*, 4 Minn. 278; *Crisler v. McCoy*, 33 Miss. 445; *Middleton v. Frame*, 21 Mo. 412; *Coney v. Laird*, 153 Mo. 408, 55 S. W. 96; *Lenzen v. Miller*, 53 Neb. 137, 73 N. W. 460; *Capron v. Strout*, 11 Nev. 304; *Sawyer v. Tappan*, 14 N. H. 352; *Bird v. Davis*, 14 N. J. Eq. 467; *Orr v. Nagle*, 87 Hun, 12, 33 N. Y. Supp. 879; *Feldman v. Beier*, 78 N. Y. 293; *Wittkowski v. Reid*, 84 N. C. 21; *Appeal of Wagner*, 103 Pa. St. 185; *Sereven v. Smith*, 1 McCord (S. C.), 368; *Pelzer v. Steadman*, 22 S. C. 279; *Fargo v. Jennings*, 8 S. Dak. 99, 65 N. W. 433; *Rotan etc. Co. v. Martin* (Tex. Civ. App.), 57 S. W. 706; *Hick's Estate v. Blanchard*, 60 Vt. 673, 15 Atl. 401; *Jeffers v. Pease*, 74 Vt. 215, 52 Atl. 422; *Hill v. Gregory*, Wythe (Va.), 73; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427; *Buster v. Holland*, 27 W. Va. 510; *Jones v. Williams*, 39 Wis. 300; *United States v. Kirkpatrick*, 9 Wheat. 720; *Sanborn v. Stark*, 31 Fed. 18. See, however, *Slaughter v. Milling*, 15 La. Ann. 526, to the effect that such right of application is not in the creditor, unless the debtor consent thereto.

b. Must not be Inequitable.—The creditor need not apply the payment in a way most beneficial to the debtor: *Shortridge v. Pardee*, 2 Mo. App. 363; but if there are circumstances which would

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render the exercise of that right unreasonable, and enable him to work an injustice to the debtor, it has been held that he cannot do so: *Arnold v. Johnson*, 2 Ill. 196; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Bray v. Crain*, 59 Tex. 649. Application by a creditor to an unsecured and not secured, indebtedness is not, however, inequitable, and is allowed: *Thatcher v. Tillory* (Tex. Civ. App.), 70 S. W. 782. See to the same effect, *Driver v. Tortner*, 5 Port. (Ala.) 9; *Coxwell v. De Vaughn*, 55 Ga. 643; *Sweeney Co. v. Fry*, 151 Ind. 178, 51 N. E. 234; *Upham v. Lefavour*, 52 Mass. (11 Met.) 174; *Van Sickle v. Ayres*, 6 N. J. Eq. 29; *Lary v. Young* (Tex. Civ. App.), 27 S. W. 908.

c. Need not be Similar Debts.—It is not necessary that the debts be of the same character; so where one is due on a note and the other on a running account, the creditor may apply a payment to either: *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. 115; *Brownlee v. Goldthait*, 73 Ind. 481. Nor are the dates of the obligations material, and he may appropriate the money to the earliest or latest one at his option: *Callahan v. Boazman*, 21 Ala. 246; *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726; *Hanson v. Rounsavell*, 74 Ill. 238.

d. Limitations upon the Right.—Only debts which are actually due come within the purview of this rule: *Gates v. Burkett*, 44 Ark. 90; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Bacon v. Brown*, 4 Ky. (1 Bibb.) 334, 4 Am. Dec. 640; and the creditor cannot apply a payment to a debt not due at the time: *Heard v. Pulaski*, 80 Ala. 502, 2 South. 343; *Law v. Sutherland*, 5 Gratt. (Va.) 557. See, also, *Hentz v. Cahn*, 29 Ill. 308; *Lowery v. Dickson*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 497.

And it must be applied to a fixed rather than a contingent, liability, as where the debtor is surety or indorser: *Niagara Bank v. Roosevelt*, 9 Cow. 409.

Where the debtor is forced by the creditors against his will to make a certain application, it is not binding on him: *Dennis v. Jones*, 31 Miss. 606.

e. Must be Existing Debts.—It is held in *McLendon v. Frost*, 57 Ga. 448, that the creditor may make the application on a just and valid demand, whether the correctness thereof be assented to by the debtor or not. The debt, however, must be an actual, existing one: *Stone v. Talbot*, 4 Wis. 442, and the reason is thus given: "To allow a creditor to apply payments thus made to a debt which he claimed to have against the debtor, but the existence of which the latter denied, would be to compel him to pay, perhaps, a fraudulent claim which the creditor had set up against him, without the possibility of defending against it."

He cannot, of course, apply it upon an extinguished or paid indebtedness: *Lyon v. Winters*, 65 Vt. 396, 26 Atl. 588.

f. Dividing Payments.—Where neither of the debts is barred by the statute of limitation, the creditor may apply a part on each, and

there is nothing inequitable in his so doing: *Beck v. Haas*, 111 Mo. 264, 33 Am. St. Rep. 516, 20 S. W. 19; *Young v. Alford*, 118 N. C. 215, 23 S. E. 973.

It is held in Vermont, however, that a creditor cannot divide a payment and apply it upon more than one debt, each one exceeding the payment in amount: *Wheeler v. House*, 27 Vt. 735. Where the notes evidencing the debt constitute but one demand, however, they may be divided: *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716, where the court, commenting upon the doctrine followed in *Wheeler v. House*, 27 Vt. 735, said: "This is upon the ground that although no application is directed, regard must nevertheless be had to the intention of the debtor, and that he cannot be presumed to have intended an application upon more than one of the notes. It is evident, however, that these cases would not be controlling where the debtor had regarded and treated the several notes as constituting one demand, and made the payment in that view."

g. Rights of Third Persons.

1. **General Rule.**—The fact that as a general rule third persons cannot control a creditor in his right of application is well expressed in *Harding v. Tift*, 75 N. Y. 461, in which case Judge Rapallo, after stating the general doctrine as to that right, proceeded: "But it is contended that the right of the creditor to make the application is subject to the condition that such application be not inequitable, and such is the language used in some of the authorities cited. The equities referred to, however, are usually equities existing between the debtor and creditor, and I have found no case recognizing those arising out of transactions between the debtor and third persons, of which the creditor has no notice. The mere fact that there is a surety for one of the debts does not preclude the creditor from applying a payment thus received, to the debt for which he has no security: *Allen v. Culver*, 3 Denio, 285; *Stone v. Seymour*, 15 Wend. 20. If the money had been raised by the debtor by the aid of the indorsement of the surety, given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and these facts had been communicated to the creditor, he would not be permitted, even with the consent of the debtor, to misapply it. But it can hardly be disputed that if the debtor brought money thus raised to the creditor, and paid it to him expressly upon the unsecured debt, without disclosing the means by which the money had been raised or any agreement as to its use, the payment would be valid. I think the same result follows when the debtor, by omitting to specify on which debt the payment is to be credited, authorizes the creditor to apply it to either, and the creditor exercises this option. The money belongs to the debtor, and where the creditor is ignorant of any duty on the part of the debtor, in respect to it, he may receive and apply it as if no such duty existed.

"If no application had been made by either party, and the duty were cast upon the court of making the proper application, the equities of the surety would doubtless be considered. But where the application has been made by the creditor, in accordance with his apparent legal right, and in ignorance of any fact which should prevent him from making such application, I do not think he is bound to change it on the subsequent disclosure that a third party had an interest in having it otherwise applied, and that the debtor had violated a duty to such third party in not directing such application. The application made by the creditor cannot be said to have been inequitable if no facts were brought to his knowledge at the time, showing that he ought not to make it": See, also, *Mack v. Colleran*, 136 N. Y. 617, 32 N. E. 604. But see *Crane etc. Co. v. Keck*, 35 Neb. 683, 53 N. W. 606, holding that the creditor has not the right where the equities of third parties intervene.

2. **As Agent or Trustee.**—Where a creditor holds a debt due himself alone, and another due himself and another, a general payment cannot be applied by him to the former: *Colby v. Copp*, 35 N. H. 434, where it is said: "As between the creditor and the debtor and his sureties, the creditor may have the right to apply the money which he has received from the debtor without any application made by him to such of his debts as it may be most for his interest to have paid. But it by no means follows that he will be entitled to make the same application when the question arises between him and those to whom he owes other duties growing out of the relation of agent or trustee. To the debtor and his surety he stands in the relation of creditor merely. He is not ordinarily an agent or trustee to either, and he owes to neither of them any duties but such as the law prescribes to him as a creditor. But if he holds the different claims among which he is by law entitled to make the appropriation, not in his own right, but as agent or trustee for others, he owes to them the duty to make a just and reasonable application of the money according to their respective equitable claims. Equality is equity ordinarily between parties, who stand in similar relations. The general rule, therefore, clearly should be, that when an agent or trustee receives money generally, and he holds claims of different persons, to each of whom he is under the same obligations, he should apply the money ratably to the discharge of all the claims, and this obligation would be in no way affected by the circumstance that if the debts were all his own, he would have the undoubted right to apply the money to either of them at his election": See, also, *Wendt v. Ross*, 33 Cal. 650; *Cole v. Trull*, 26 Mass. (9 Pick.) 325.

h. Joint and Partnership Obligations.—A creditor cannot appropriate payments made by a debtor firm to the individual debts of one or more members of such firm: *Farris v. Morrison*, 66 Ark. 318, 50 S. W. 693. But where a member of a firm makes a payment to one holding an account against him individually and another against the

firm, unless the debtor consent thereto, the creditor cannot impute it to the firm debt: *Johnson v. Boone*, 2 Harr. (Del.) 172. See, however, *Brown v. Brabham*, 3 Ohio, 275. And where a mortgage on a partner's individual property by its terms is given to secure an individual debt, and is also intended as a firm debt assumed by the debtor, the creditor may apply it to the individual debt: *Senter v. Williams* (Ark.), 17 S. W. 1029. So where a partnership is sued on an account for some items of which only one member is liable, and a separate judgment has been previously obtained against him on security given by him alone for the amount of the whole account, upon which a sum was collected, credit may be applied first to the items for which he alone is liable: *Lee v. Fontaine*, 10 Ala. 755, 44 Am. Dec. 505. Where an individual debt has by agreement of the parties entered into the accounts of the partnership, as to how payment should be applied: see *Allgoever v. Edmunds*, 66 Barb. 579.

Where a debtor owes an individual debt and also another to a firm of which the creditor is a member, and the former is assigned to such firm, it is immaterial upon which debt payment is applied: *Badger v. Daenieke*, 56 Wis. 678, 14 N. W. 821.

A creditor may apply a general payment on a several or a joint indebtedness of his debtor, at his option: *Van Rensselaer v. Roberts*, 5 Denio, 470; but in the absence of any appropriation by the parties, the law will apply it on his individual note: *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783.

i. Where Payment is Derived from a Particular Fund.—Another limitation put upon the power of the creditor to apply payments is when the money is derived from a particular source or fund, in which case it must be applied to the relief of such source or fund. So where mortgaged property is sold, the creditor must apply it in discharge of the mortgage debt: *Johnson v. Thomas*, 77 Ala. 367; *Taylor v. Cockrell*, 80 Ala. 236; *Darden v. Gerson*, 91 Ala. 323, 9 South. 278; *Pritchard v. Comer*, 71 Ga. 13; *Snider v. Stone*, 78 Ill. App. 17; *Brinckerhoff v. Greenan*, 85 Ill. App. 253; *Heaton v. Ainley*, 108 Iowa, 112, 78 N. W. 798; *Suter v. Ives*, 47 Md. 520; *Hicks v. Bingham*, 11 Mass. 300; *Ogden v. Harrison*, 56 Miss. 743; *Thatcher v. Massey*, 20 S. C. 542; *Ellis v. Mason*, 32 S. C. 277, 10 S. E. 1069. And see *Perdue v. Brooks*, 85 Ala. 459, 5 South. 126.

Where a claim against a corporation, subsequently becoming insolvent, is transferred to a creditor, a dividend thereafter declared by it should be applied on that debt, and not upon notes on which the transferrer of the claim was accommodation indorser for the corporation: *Watson v. New Jersey etc. Co.* (N. J.), 29 Atl. 186. As to the application of the avails of an insurance policy, see *Brighton v. Doyle*, 64 Vt. 616, 25 Atl. 694.

If the debtor consent, however, the money so realized may be applied to any other indebtedness; and having once assented he is estopped from complaining: *Bonner v. Styron*, 113 N. C. 30, 18 S. E.

83. In such a case the burden is on the creditor to show an agreement that it be applied to another debt: *Strickland v. Hardie*, 82 Ala. 412, 3 South. 40.

j. Where Payment is Received for a Special Purpose.—The same rule applies to money received for a specific purpose, and in such a case it must be so applied and cannot be diverted: *Smuller v. Union Canal Co.*, 37 Pa. St. 68, citing *United States Bank v. Macalester*, 9 Pa. St. 475. So where land is purchased at a fixed price, payable in services for a certain term, the vendor must apply credit for so much time as was actually served to such purchase price, and not to another account: *Young v. Harris*, 36 Ark. 162. And where an express company delivers goods to a consignee C. O. D., receiving part payment, which was remitted to the consignor, the latter has no right to apply it to other indebtedness of the consignee, but must credit it on that debt alone: *American Exp. Co. v. Lessem*, 39 Ill. 312.

k. Debtor must have Opportunity to Apply.—The creditor's right to make the appropriation applies only to where the debtor has had an opportunity of exercising his right; and if payments are made on his account by a third person, or in such a way as to impede his right, the rule does not apply: *Jones v. Williams*, 39 Wis. 300.

III. Application by the Court.

a. Where Neither Party Applies.—Both debtor and creditor having failed to direct the application of a payment, the authorities unanimously hold that this duty devolves upon the court, and is to be exercised equitably and justly: *Callahan v. Boazman*, 21 Ala. 246; *Price v. Dowdy*, 34 Ark. 285; *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *London etc. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; *Fairchild v. Holly*, 10 Conn. 175; *Chester v. Wheelright*, 15 Conn. 562; *Pickering v. Day*, 2 Del. Ch. 333; *McCartney v. Buck*, 8 Houst. (Del.) 34, 12 Atl. 717; *Randall v. Parramore*, 1 Fla. 409; *Hargroves v. Cook*, 15 Ga. 321; *Andrews v. Exchange Bank*, 108 Ga. 802, 34 S. E. 183; *Dehner v. Helmbacher. etc. Mills*, 7 Ill. App. 47; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *McCauley v. Holtz*, 62 Ind. 205; *Jacobs v. Ballenger*, 130 Ind. 231, 29 N. E. 782; *First Nat. Bank v. Hollinsworth*, 78 Iowa, 575, 43 N. W. 536; *Blanton v. Rice*, 21 Ky. (5 T. B. Mon.) 253; *Hillyer v. Vaughan*, 24 Ky. (1 J. J. Marsh.) 583; *Slaughter v. Milling*, 15 La. Ann. 526; *Calvert v. Carter*, 18 Md. 73; *Lee v. Early*, 44 Md. 80; *Richardson v. Woodbury*, 66 Mass. (12 Cush.) 279; *Youmans v. Heartt*, 34 Mich. 397; *Grasser etc. Co. v. Rogers*, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445; *Solomon v. Dreschler*, 4 Minn. 278; *Dennis v. Jones*, 31 Miss. 606; *Champenois v. Fort*, 45 Miss. 355; *Poulson v. Collier*, 18 Mo. App. 583; *Missouri etc. Co. v. Stewart*, 78 Mo. App. 456, 2 Mo. App. Rep. 274; *Hilton v. Burley*, 2 N. H. 193; *Thompson v. Phelan*, 22 N. H. 339; *White v. Trumbull*, 15 N. J. L. 314, 29 Am. Dec. 687; *Terhune v. Colton*, 12 N. J. Eq. 232, 312; *Allen v. Culver*, 3 Denio, 284; *Davis v. Fargo*, 1

Clarke Ch. (N. Y.) 470; Vick v. Smith, 83 N. C. 80; Raymond v. Newman, 122 N. C. 52, 92 S. E. 353; Trullinger v. Kofoed, 7 Or. 228, 33 Am. Rep. 708; Moore v. Kiff, 78 Pa. St. 96; Risher v. Risher, 194 Pa. St. 164, 45 Atl. 71; Bell v. Bell, 20 S. C. 34; White v. Blakemore, 76 Tenn. (8 Lea) 49; Proctor v. Marshall, 18 Tex. 63; Phillips v. Haddon, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857; Robinson v. Doolittle, 12 Vt. 246; Ayer v. Hawkins, 19 Vt. 26; Chapman v. Commonwealth, 25 Gratt. (Va.) 721; Frazer v. Miller, 7 Wash. 521, 35 Pac. 427; Norris v. Beaty, 6 W. Va. 477; Buster v. Holland, 27 W. Va. 510; Jones v. Williams, 39 Wis. 300; United States v. Kirkpatrick, 21 U. S. (9 Wheat.) 720; United States v. Wardwell, 5 Mason, 82, Fed. Cas. No. 16,640; Whetmore v. Murdock, 3 Wood. & M. 390, Fed. Cas. No. 17,510.

b. How the Court Acts.—This rule, on account of the diverse states of fact that may arise is subject to uncertainty in its application, and this fact is well brought out in *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271, 9 N. W. 590, in the following language: "The general rule governing the appropriation of payments where the parties have not made it, is 'that the court will direct it according to the justice and equity of the case.' In this form it is rather the enunciation of a principle than of a rule for practical application. In attempting to state the rule, courts have often used general and vague expressions; as, for example: 'The application becomes the duty of the court, and in its performance a sound discretion is to be exercised'; or, 'the law will apply payments according to its notions of justice; or, again, 'on equitable principles,' and 'so as to effectuate justice,' and 'according to the intrinsic justice and equity of the case.' If these expressions are to be accepted as criterions for judicial action, the rule would become, as well remarked by one, as varying and uncertain as the famous 'chancellor's foot' rule. Such a state of law would be opposed to all correct notions of judicial action. It is true that, where the parties have not made any specific application of payments, courts will make it according to the justice and equity of the case; but in doing so they are governed by certain general and established rules, and are not at liberty to adopt their own notions of what may be just and equitable in each particular case: *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597; *Bohe v. Stiekney*, 36 Ala. 482."

In most of the decisions, however, general principles give way to the justice required by the particular facts of each case: *White v. Trumbull*, 15 N. J. L. 314, 29 Am. Dec. 687.

c. Oldest Debts.—The most usual application made by the court, where the debts are of the same nature and no equitable considerations intervene, is to the earliest debt: *Duncan v. Thomas*, 81 Cal. 56, 22 Pac. 297; *Coalter v. Hurst*, 97 Cal. 290, 32 Pac. 248; *Fairchild v. Holly*, 10 Conn. 175; *Lodge v. Ainscow*, 1 Penne. (Del.) 327, 41 Atl. 187; *Price v. Cutts*, 29 Ga. 142, 74 Am. Dec. 52; *Killorin v.*

Bacon, 57 Ga. 497; Dehner v. Helmbacher etc. Mills, 7 Ill. App. 47; Bloom v. Kern, 30 La. Ann. 1263; Beck v. Haas, 111 Mo. 264, 33 Am. St. Rep. 516, 20 S. W. 19; Littleton v. Harris, 69 Mo. App. 596; Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 153; Thompson v. Phelan, 22 N. H. 339; Bean v. Brown, 54 N. H. 395; Anderson v. Daley, 38 App. Div. 505, 56 N. Y. Supp. 511; Hollister v. Davis, 54 Pa. St. 508; Risher v. Risher, 194 Pa. St. 164, 45 Atl. 71; St. Albans v. Failey, 46 Vt. 448; Frazer v. Miller, 7 Wash. 521, 35 Pac. 427; Boody v. United States, Fed. Cas. No. 1636, 1 Wood. & M. 150; In re Stevens, 107 Fed. 243; McMullen v. Barges 2 & 4, 58 Fed. 425. See, also, Wyman v. Herard, 9 Okla. 35, 59 Pac. 1009. The antiquity of a demand depends, not on when the debt was contracted, but on when it falls due: Lanusse v. Lanna, 6 Mart., N. S., 103.

Where part of a debt accrued before, and part after the passage of an exemption law, and a payment is made, it is applied to the first accruing indebtedness: Wheeler v. Cropsey, 5 How. Pr. 288.

d. Secured and Unsecured Debts.

1. **By Lien or Mortgage.**—The court, seeking only to do justice between the parties, does not always apply a payment to the most ancient debt: Campbell v. Vedder, 1 Abb. Dec. (N. Y.) 295. So where one debt is secured and the other is not, or, both being secured, one is more precarious than the other, it will generally be imputed by law to the unsecured or precarious debt: California etc. Bank v. Ginty, 108 Cal. 148, 41 Pac. 38; Monson v. Meyer, 93 Ill. App. 94; King v. Andrews, 30 Ind. 429; First Nat. Bank v. Hollinsworth, 78 Iowa, 575, 43 N. W. 536; Burks v. Albert, 27 Ky. (4 J. J. Marsh.) 97, 20 Am. Dec. 209; Bell etc. Co. v. Kentucky etc. Co., 21 Ky. Law Rep. 156, 50 S. W. 1092; Andrews v. Land Assns.' Assignee, 24 Ky. Law Rep. 966, 70 S. W. 409; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Poulson v. Collier, 18 Mo. App. 583; McMillan v. Grayston, 83 Mo. App. 425; Smith v. Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153; Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795; Turner v. Hill, 56 N. J. Eq. 293, 39 Atl. 137; Ransom v. Thomas, 33 N. C. (11 Ired.) 251; Sprinkle v. Martin, 72 N. C. 92; Moose v. Marks, 116 N. C. 785, 21 S. E. 561; Briggs v. Williams, 2 Vt. 283; Hempfield R. Co. v. Thornburg, 1 W. Va. 261; Sanborn v. Stark, 31 Fed. 18; The Katie O'Neil, 65 Fed. 111. See, also, Scott v. Cox (Tex. Civ. App.), 70 S. W. 802; United States v. Morgan, 111 Fed. 474.

This mode of application is, however, not binding on the court, and if equity requires a different appropriation it will be so made: Compound Lumber Co. v. Murphy, 169 Ill. 343, 48 N. E. 472. So the law will apply freight money received by the consignee of a ship to the discharge of the liens on the ship, because it is important that they be extinguished as soon as possible: The J. F. Spencer, Fed. Cas. No. 7316 (5 Ben. 151).

2. **By Surety.**—The security to which most of the authorities have reference is security given by the debtor, as by pledge, lien, or mort-

gage. There is, however, another kind, namely, security by means of a third person, as surety or guarantor. The law in the latter case is concisely summed up in *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229, as follows: "The rule is thus stated in *Bridenbecker v. Lowell*, 32 Barb. 23: 'Prathier lays down the rule that the application ought to be made to the debt for which the debtor has given surety, rather than to those he owes singly. The honor of the debtor is concerned in such payment': Citing *Story's Equity Jurisprudence*, sec. 459c; *Marryatts v. White*, 2 Stark. 101. In Pennsylvania, where the civil law does not prevail, it is still held that the payment will be made to the oldest debt. In the case of *Pardee v. Markle*, 111 Pa. St. 555, 56 Am. Rep. 299, 5 Atl. 41, the court say: 'The latter rule [to wit, to apply to the most precarious security] will prevail whenever the interest of the creditor requires that it should, but not to the prejudice of a surety, who may insist on an appropriation under the rule first stated [to wit, the oldest debt] and hold himself bound or discharged accordingly: *Berghaus v. Alter*, 9 Watts, 386.' See, also, *Pierce v. Sweet*, 33 Pa. St. 151. Mr. Daniel, in his work on *Negotiable Instruments*, section 1252, says, in effect, that payments will be applied to the unsecured in preference to secured debts, unless the latter are secured by a surety, in which case application will be made for his relief. To the same effect, see *Randolph on Commercial Paper*, 1503, 1494; *Tiedeman on Commercial Paper*, 377; *Brandt on Suretyship and Guaranty*, 330.

e. Interest-bearing Obligations.—If neither of the methods of application already mentioned is sufficient to effectuate justice, other application may be made, and an interest-bearing, rather than a non-interest-bearing, debt may be preferred: *Blanton v. Rice*, 21 Ky. (5 T. B. Mon.) 253; *McDaniel v. Burnes*, 68 Ky. (5 Bush) 183; *Scott v. Cleveland*, 33 Miss. 447.

f. Fixed and Contingent Liabilities.—The law will apply a payment to a fixed, rather than to a contingent, liability, as surety or indorser: *Missouri etc. Co. v. Stewart*, 78 Mo. App. 456, 2 Mo. App. Rep. 274; *Thomas v. Kelsey*, 30 Barb. 268. See, also, *Newman v. Meek*, *Smedes & M. Ch. (Miss.)* 331. And, other things being equal, payment will be applied to a note absolutely due the creditor, rather than one transferred to him as collateral security only: *Bank of Portland v. Brown*, 22 Me. 295. So, where a part of the indebtedness is a personal debt, and a part is not, a general payment will be imputed to the former: *Snyder v. Robinson*, 35 Ind. 311, 9 Am. Rep. 738.

g. Debts Due and not Due.—Where some of the debts are due and some not, payment will be appropriated by law to the former: *Harri-son v. Johnson*, 27 Ala. 445; *Bobe v. Stickney*, 36 Ala. 482; *McWhorter v. Bluthenthal* (the principal case), 136 Ala. 568, 33 South. 552; *Stamford Bank v. Benedict*, 15 Conn. 437; *Cloney v. Richardson*, 34 Mo. 370; *Seymour v. Sexton*, 10 Watts (Pa.), 255; *McDowell v. Blackstone Canal Co.*, Fed. Cas. No. 8777, 5 Mason, 11.

h. Pro Rata Application.—If the debts are equal in other respects, the court will apply a payment pro rata among them, equity and fairness requiring no different application: *White v. Trumbull*, 15 N. J. L. 314, 29 Am. Dec. 687; *Jones v. Kilgore*, 2 Rich. Eq. (S. C.) 63. And see *Sproule v. McFarland* (Tex. Civ. App.), 56 S. W. 693; *Shelden v. Bennett*, 44 Mich. 634, 7 N. W. 223.

i. Indivisible Transactions.—Where a contract for goods is indivisible, payment should be applied to the sum due thereon, and not to any particular item: *Hill v. McLaughlin*, 153 Mass. 307, 33 N. E. 514; *Seannell v. Hub Brewing Co.*, 178 Mass. 288, 59 N. E. 628. And matured notes arising out of the same transaction in the hands of the same creditor against the same debtor, constitute but one debt, and payment made after their maturity should be applied to the whole debt: *Eyle v. Roman Catholic Church*, 36 La. Ann. 310. And see *Moorman v. Shockney*, 95 Ind. 88.

j. Particular Source.—As before remarked, when the money is derived from a particular source or fund, it must be applied to the relief thereof, in the absence of a contrary agreement between the parties, and the law will not tolerate any other application: *Levystein v. Whitman*, 59 Ala. 345.

k. Intention of the Parties.

1. Followed if Ascertainable.—When the intention of the parties can be determined with reasonable certainty, the court will apply it accordingly: *Emery v. Tichout*, 13 Vt. 15; *McIntyre v. Corss*, 18 Vt. 451; *The Martha*, 29 Fed. 708; *The Mary K. Campbell*, 40 Fed. 906. Difficulty arises, however, when such intention cannot be ascertained. A review of the authorities heretofore cited will show that the law makes application in some cases in favor of the debtor, as where interest-bearing debts are discharged in preference to those not bearing interest, and in other cases in favor of the creditor, as where payment is first appropriated to unsecured claims. This naturally gives rise to the question whether one is more favored in law than the other. Upon this point there is a diversity of opinion.

2. The Roman Law.—The Roman law favored the debtor, and by it the creditor was forced to apply a general payment in the manner most beneficial to the debtor: *Logan v. Mason*, 6 Watts & S. (Pa.) 9; *United States v. Bradbury*, Fed. Cas. No. 14,635, 2 Ware, 150. This doctrine is severely and justly criticised by Chancellor Walworth in *Stone v. Seymour*, 15 Wend. 19, in the following strong language: "The Roman law proceeded upon the erroneous principle that where there was an indefinite payment, the creditor was bound to act upon the Golden Rule of doing as he would be done by, if he was himself the debtor; and must therefore apply it in that way which would be most beneficial for the debtor. In adopting this principle, the Roman law-givers overlooked the fact that where there were conflicting interests, the Golden Rule applied to the debtor as

well as the creditor; and that, upon the same principle, it would be the duty of the debtor to allow his creditor to apply the payment in the way that he might consider the most beneficial to himself. In other words, that the debtor, as well as the creditor, should be required to do as he would be done by under like circumstances; the effect of which conflicting duties would be to leave the application to be made according to equity between the parties. And this rule of equity would not require the creditor, where both debts were due and ought to be paid, to apply the payment to that which was secured upon the debtor's property, and drawing interest, instead of one which was insecure, and from which he was deriving no income, while he was deprived of the use of his money by the neglect of the debtor to pay both debts. The true principle, unquestionably, is that stated by Chief Justice Marshall in *Field v. Holland*, 6 Cranch, 27; that the debtor, by neglecting to manifest his intention, or to direct as to the application of a partial payment, tacitly surrenders the right to the creditor, and enables him to apply the payment in such manner as he shall think proper, provided that such application is not inequitable; and if the creditor is not in a situation to exercise the right, or if he declines the exercise of the power to make the appropriation, because he has no interest in the question and the rights of third persons only are concerned, the court upon whom the exercise of the power devolves in that case should make the application upon equitable principles."

3. The Debtor Favored.

A. Most Burdensome Debts Discharged.—This principle of the civil law has been followed in several jurisdictions in the United States, and the debtor is favored in every way; so where one debt is a mortgage debt and the other is due on simple contract, the former, being the most onerous, is discharged: *Johnson v. Sterling*, 3 Mart., N. S., 483; *Forstall v. Blanchard*, 12 La. Ann. 1; *Dunlop v. Tarkington*, 5 La. Ann. 569; *Gillard v. Huval*, 22 La. Ann. 426; *Miller v. The S. F. J. Trabue*, 16 La. Ann. 375; *McTavish v. Carroll*, 1 Md. Ch. 160; *Calvert v. Carter*, 18 Md. 73; *Lee v. Early*, 44 Md. 80; *Laeber v. Langhor*, 45 Md. 477; *Clark v. Boarman*, 89 Md. 428, 43 Atl. 926; *Poindexter v. La Roche*, 15 Miss. (7 Smedes & M.) 699; *Baine v. Williams*, 18 Miss. (10 Smedes & M.) 113; *Neal v. Allison*, 50 Miss. 175; *Windsor v. Kennedy*, 52 Miss. 164; *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Bussey v. Gant*, 23 Tenn. (10 Humph.) 238; *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857; *Phipps v. Willis*, 11 Tex. Civ. App. 186, 32 S. W. 801; *Paschall v. Loan Co.*, 19 Tex. Civ. App. 102, 47 S. W. 98; *Robinson v. Doolittle*, 12 Vt. 246; *The Antarctic*, Fed. Cas. No. 479, 1 Sprague, 206. See, also, *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160. That the common law has borrowed the rules regarding the application of payments from the civil law, and should be

followed in favoring the debtor, see *Gass v. Stinson*, Fed. Cas. No. 5262, 3 Sum. 98.

B. Exceptions to the Rule.—Although one debt may be more burdensome to the debtor than another, if it be not due the rule does not apply, and payment will be imputed only to the debt actually due: *Follain v. Orillion*, 9 Rob. (La.) 506; *Cox v. Rees*, 10 La. 232; *Spiller v. His Creditors*, 16 La. Ann. 292. Whether one debt is more onerous than another depends upon the interest the debtor has in discharging it, and a debt contracted as surety for another is not necessarily less onerous than one due from him as principal: *Denis v. Ramouin*, 1 Rob. (La.) 318.

Where there is an express agreement between the parties, or a course of business from which an agreement may be implied, that another rule shall control, the debtor cannot invoke the principle that a payment must be applied most beneficially to him: *Gwin v. McLean*, 62 Miss. 121. Nor does it accrue to the benefit of a purchaser of mortgaged property, where a subsequent partial payment is made by the mortgagor, which, by consent, is to be applied by the mortgagee to other indebtedness: *Hiller v. Levy*, 66 Miss. 30, 5 South. 226.

It has, however, been applied to the payment of legacies: *Buchanan v. Lloyd*, 88 Md. 642, 41 Atl. 1075.

4. The Creditor Favored.—Other authorities hold that the advantage should be given the creditor, and that his presumed intention should govern. The reason for this is thus given in *Sager v. Warley*, Rice Eq. (S. C.) 26: "In general, it is a rule not only of law, but of sound reason, that when an act is done, fairly susceptible of two interpretations, or to which two different operations may be justly allowed, it shall be construed most against him who does it, and in favor of the other party; and it is not perceived why the payment of money should not be governed by the same principle. As between the parties themselves, it would be difficult for the debtor to satisfy the conscience of any just man, that when he has made a general payment, without directing its application, the court should not so apply it as to promote to the highest degree the interests of the creditor." See to the same effect, *Hare v. Stegall*, 60 Ill. 380; *Chicago Title etc. Co. v. McGlew*, 90 Ill. App. 58; *Coons v. Tome*, 9 Fed. 532. In *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691, it was held that the law presumed that the debtor intended to pay in the way most beneficial to himself; and if it made no difference to him, then most advantageously to the creditor. Later decisions of that court, however, hold that the application should favor the creditor: *Johnson's Appeal*, 37 Pa. St. 268; *Smith v. Brooke*, 49 Pa. St. 147. This view is said to prevail in most of the United States and in England, in *Pierce v. Sweet*, 33 Pa. St. 151; but that the law is not so established in England, see *Pattison v. Hull*, 9 Cow.

747. That the debtor should not be favored, see *Field v. Holland*, 10 U. S. (6 Cranch) 8.

5. Neither Favored.—A third rule is followed in still other jurisdictions, allowing the court to apply it as best to subserve the ends of justice. "No general rule applicable to every case could be adopted and adhered to, without producing great hardship. Men keep their accounts loosely; scarcely any case occurs, which does not vary, in some material circumstances, from every other case. Justice to creditor, or debtor, would frequently require exceptions to any specific rule that might be adopted; and these exceptions would multiply with the ever-varying dealings and transactions of individuals, until at length the rule itself, and the particular cases in which it could apply, would become exceptions. If the parties, having the power, fail to use it, they cannot complain that the law, not conforming itself to the presumed intentions of either, makes the application according to the justice of the particular case, in view of all the circumstances attending it": *Smith v. Loyd*, 11 Leigh (Va.), 512, 37 Am. Dec. 621. See in accord, *Stamford Bank v. Benedict*, 15 Conn. 437; *Thorne v. Allen*, 72 Minn. 461, 75 N. W. 706; *Coles v. Withers*, 33 Gratt. (Va.) 186; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109; *Buster v. Holland*, 27 W. Va. 510. The decisions in Vermont are in conflict as to who should be favored, but the best rule is held to be, not to favor either: *Pierce v. Knight*, 31 Vt. 701.

As to the difficulty of providing by statutory enactment rules which will govern in all cases which may arise, see *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601. Principles of equity respecting the application of payments are recognized in proceedings at law, as far as the nature of the proceedings will admit: *Merrimack County Bank v. Brown*, 12 N. H. 320; *Thompson v. Phelan*, 22 N. H. 339; *Young v. Woodward*, 44 N. H. 250.

1. Application by the Parties Controls.—The court will make the application only in the event that both the parties have failed to do so: *Feldman v. Gamble*, 26 N. J. Eq. 494; *Seymour v. Marvin*, 11 Barb. 80. See, also, *Hilton v. Sims*, 45 Ga. 565; and an agreement between the parties as to the appropriation controls: *Shaw v. Pratt*, 39 Mass. (22 Pick.) 305; *Larkin v. Watt* (Tex. Civ. App.), 32 S. W. 552; *Genin v. Ingersoll*, 11 W. Va. 549. So where the parties, or either of them, have rightfully applied a payment, it is final, and the law will not interfere therewith: *Merceer v. Tift*, 79 Ga. 174, 4 S. E. 114; *Pond etc. Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 159, 248; *Bank of Muskingum Co. v. Carpenter*, 7 Ohio, pt. 1, 21, 28 Am. Dec. 616; *Selfridge v. Northampton Bank*, 8 Watts & S. (Pa.) 320. Before the law will make the appropriation, there must be some evidence tending to show that the parties themselves had made none: *Albert v. Lindau*, 46 Md. 334.

m. Province of Judge and Jury.—It is for the jury to apply a payment under the evidence before them and the direction of the court: *Oliver v. Phelps*, 20 N. J. L. 180. See, also, *Selleck v. Sugar Hollow etc. Co.*, 13 Conn. 453; *McFarland v. Lewis*, 3 Ill. 344. It is held in *Nutall v. Branin*, 68 Ky. (5 Bush) 11, that, in the absence of appropriation by either party, it is for the judge to apply it, and allowing the jury to do so is error.

n. Where Only One Demand.—The rule regarding the application of payments by the court has reference only to where the creditor has two or more legal claims against the debtor, to either of which the payment might be lawfully imputed: *Greene v. Tyler*, 39 Pa. St. 361. Where, therefore, there is only one demand, payment will be presumed to have been made thereon, and will be applied accordingly: *McDonnell v. Branch Bank*, 20 Ala. 313; *Blinn v. Chester*, 5 Day (Conn.), 166; *Harvey v. Quick*, 9 Ind. 258; *Wartelle v. Le Blanc*, 10 La. 556; *Trumbo v. Flournoy*, 77 Mo. App. 324.

The law will make the application only on an established or admitted claim, and if none is so established or admitted, the court will refuse to act: *Cary v. Herrin*, 62 Me. 16.

The fact that there is more than one debt due the creditor, but that the debtor has knowledge of one only, will not be sufficient for the law to apply the payment to the known debt: *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485. In that case, speaking of the unknown debts, the court said: "Though the plaintiff (debtor) may not, at the instant, have known them, yet the law took cognizance of them, and so made no appropriation. It was the right of the plaintiff to make it." Where one of the debts is repudiated, the rules of application do not apply: *Manning v. The Peerless*, 80 Fed. 942.

IV. Accounts.

a. The General Rule Applies.—One of the most common modes of dealing between debtor and creditor is by means of open, running, or current accounts, consisting of numerous items, and it becomes important to determine how a payment made thereon should be applied. Where there is an agreement between the parties it controls absolutely, as in the case of separate debts: *Price v. Dowdy*, 34 Ark. 285; *Miller v. Womble*, 122 N. C. 135, 29 S. E. 102; *Mack v. Adler*, 22 Fed. 570. The debtor may also apply it to any item he may see fit: *Crawford v. Pancoast* (Tex. Civ. App.), 62 S. W. 559; and if he fail, the creditor may: *Kenton etc. Mfg. Co. v. McAlpin*, 5 Fed. 737; who may apply it to the oldest item of the account if he wishes: *McCasland v. O'Brien*, 57 Ill. App. 636; *Coxe etc. v. Millbrath*, 119 Wis. 499, 86 N. W. 174. See, however, *Hughes v. Johnson*, 38 Ark. 285, denying this right in the creditor.

b. By the Court.

1. To Items First Accrued.—The rule in regard to the application made by the law in the matter of accounts is concisely stated in

Pierce v. Knight, 31 Vt. 701: "Among the cases where courts have been called upon to make the application is that of open current accounts, consisting of different items of debt and credit blended in one account. Where the dealings of parties are kept in this way, the different items are not considered as distinct and several debts, but as all constituting but one entire account, the balance of which is the debt between the parties.

"The rule of application in such cases has, perhaps, been more uniform and invariable than in almost any other case, and that is (where there is nothing to show a different intention by the parties) that the payment shall be applied in the order of time they were made, to the charges in the order they accrued; the earliest credits to pay the earliest charges. This is done because it is most just and equitable between the parties, and also because when no different intention has been expressed, such is presumed to be the intention of both parties, as being in accordance with the ordinary and usual course of dealing."

The following authorities bear this out: Bradley v. Murray, 66 Ala. 269; Golden v. Conner, 89 Ala. 598, 8 South. 148; Rogers v. Yarnell, 51 Ark. 198, 10 S. W. 622; Lazarus v. Freidheim, 51 Ark. 371, 11 S. W. 518; Wendt v. Ross, 33 Cal. 650; Mackey v. Fullerton, 7 Cal. 556, 4 Pac. 1198; Pickering v. Day, 2 Del. Ch. 333; Lodge v. Ainscow, 1 Penne. (Del.) 327, 41 Atl. 187; Hargroves v. Cook, 15 Ga. 321; Bancroft v. Holton, 59 N. H. 141; A. Fuerman Brewing Co. v. Pisa, 44 Ill. App. 207; Carey-Lombard etc. Co. v. Hunt, 54 Ill. App. 314; Allen v. Brown, 39 Iowa, 330; First Nat. Bank v. Hollinsworth, 78 Iowa, 575, 43 N. W. 536; Sternberger v. Gowdy, 93 Ky. 146, 19 S. W. 186, 14 Ky. Law Rep. 88; Succession of Dinkgrave, 31 La. Ann. 703; Sleet v. Sleet, 109 La. 302, 33 South. 322; McZenzie v. Nevins, 22 Me. 138, 38 Am. Dec. 291; Allstan v. Contee, 4 Har. & J. (Md.) 351; Grasser etc. Co. v. Rogers, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445; People v. Sheehan, 118 Mich. 539, 77 N. W. 88; Jefferson v. Church etc., 41 Minn. 392, 43 N. W. 74; Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36; Kaufman-Wilkinson etc. Co. v. Christophel, 59 Mo. App. 80; Truscott v. King, 6 N. Y. 147; Thompson v. Nat. Bank, 113 N. Y. 325, 21 N. E. 57; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; Jenkins v. Smith, 72 N. C. 296; State v. Chadwick, 10 Or. 423; Patterson v. Bank etc., 26 Or. 509, 38 Pac. 817; Pierce v. Sweet, 33 Pa. St. 151; Souder v. Schechterly, 91 Pa. St. 83; Briggs v. Titus, 7 R. I. 441; Lippman v. Boals, 84 Tenn. (16 Lea) 283; Willis v. McIntyre, 70 Tex. 34, 8 Am. St. Rep. 574, 7 S. W. 594; Shuford v. Chinski (Tex. Civ. App.), 26 S. W. 141; Shedd v. Wilson, 27 Vt. 478; Hannan v. Engelmann, 49 Wis. 278, 5 N. W. 791; United States v. Kirkpatrick, 22 U. S. (9 Wheat.) 720; Seef v. Goodwin, Fed. Cas. No. 8207, Taney, 460; United States v. Wardwell, Fed. Cas. No. 16,640, 5 Mason, 82; McDonald v. The Tom Lysle, 48 Fed. 690. It

is not necessary that the account be for goods, and the same rule applies to an account for services rendered: *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *The Louie Dole*, 14 Fed. 862, 11 Biss. 479. The same rule applies to the accounts of public officers: *Bourne v. Repass (Va.)*, 34 S. E. 623.

2. Where Part Secured and Part not.

A. Applied to Oldest Items.—The authorities are not in harmony as to the disposition which should be made of a payment made generally on an account, where some of its items are secured and some not. One line of cases holds that payment should be applied to the oldest item, regardless of the fact that it is secured, whereas later items are not: *Harrison v. Johnston*, 27 Ala. 445; *Moses v. Noble*, 86 Ala. 407, 5 South. 181; *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Tapper v. Machine Co.*, 22 Ind. App. 313, 53 N. E. 202; *Worthley v. Emerson*, 116 Mass. 374; *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597; *Cushing v. Wyman*, 44 Me. 121; *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271, 9 N. W. 590; *Dey v. Anderson*, 39 N. J. L. 199; *McKee v. Commonwealth*, 2 Grant Cas. (Pa.) 23; *Phipps v. Willis*, 11 Tex. Civ. App. 186, 32 S. W. 801.

B. Applied to Unsecured Items.—The view just set forth, while the more general, is not universal: *Dunnington v. Kirk*, 57 Ark. 595, 22 S. W. 430; and where equity requires a different rule, the former doctrine will be departed from: *Stickney v. Moore*, 108 Ala. 590, 19 South. 76; *Dulles v. De Forest*, 19 Conn. 190; *Crompton v. Pratt*, 105 Mass. 255; *Whetmore v. Murdock*, Fed. Cas. No. 17,510, 3 Wood. & M. 390. And in the following cases, the unsecured debts were extinguished in preference to the oldest: *Goetz v. Piel*, 26 Mo. App. 634; *Price v. Merritt*, 55 Mo. App. 640; *Pardee v. Markle*, 111 Pa. 548, 56 Am. Rep. 299, 5 Atl. 36; *Langdon v. Bowen*, 46 Vt. 512; *Schuelenberg v. Martin*, 2 Fed. 747, 1 McCrary, 348. In *The D. B. Steelman*, 48 Fed. 580, a payment was applied to an unsecured item in order to preserve a maritime lien.

3. Where Two Accounts Exist.—Where there are two or more accounts the same general rules apply as in the case of simple debts. So where one account is settled, a payment must be applied to the other one, still owing: *Buxton v. Debrecht*, 95 Mo. App. 599, 69 S. W. 616; and if one account be due and the other not, it should be imputed to the former: *Effinger v. Henderson*, 33 Miss. 449.

The party making the payment is not precluded by reason of the general payments from showing that the workmanship was bad and the materials defective as to any items of the account, and claiming reasonable reductions therefor: *Chester etc. Co. v. Whittington*, 94 Pa. St. 139.

4. Subsequent Appropriation.—Where there is no direction as to the application, and it is entered as a general credit on the general account, the creditor cannot make an application afterward to any

specific part of the account to serve his interests as may be subsequently developed: *Lane etc. Co. v. Jones*, 79 Ala. 156. Where a factor wrongfully delivered goods of his principal to the defendant, whom the principal sued to recover the goods, the court held that a payment by the factor to the principal on a running account would not be applied in satisfaction of the goods sued for: *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293. As to death of the principal revoking agency, and its effect upon the settlement of account, see *Gifford v. Thomas*, 62 Vt. 34, 19 Atl. 1088.

5. Account at Bank.—The general rule in regard to an account with a bank is stated to be “that where moneys drawn out and moneys paid in, or other debts and credits are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but where by express agreement, or by a course of dealing between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker”: *National etc. Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368.

6. Interruption in Running of Account.

A. Change in Firm.—The fact that the personnel of a firm is changed makes no difference. *Forst v. Kirkpatrick* (N. J. Eq.), 54 Atl. 554, where the court said: “Since the case of *Devaynes v. Noble*, 1 Meriv. 529, the rule has been recognized that if, after dissolution of a firm by a change in the partnership, an account is carried on as a running account with the succeeding firms, payments made to subsequent firms, unless appropriated by the party, will go to discharge the oldest items of the account: *Bates on Partnership*, par. 497; *Simson v. Cooke*, 1 Bing. 452; *Bodenham v. Purchas*, 2 Barn. & Ald. 39; *Pemberton v. Cakes*, 4 Russ. 154; *Bank of Scotland v. Christie*, 8 Clark & F. 214.” See to the same effect *Schoonover v. Osborne*, 108 Iowa, 453, 79 N. W. 263; *Morgan v. Tarbell*, 28 Vt. 498. In *Frank v. Lockhart*, 34 Misc. Rep. 781, 68 N. Y. Supp. 838, a woman agreed to pay a debt owed by her husband, and the plaintiff thereupon sold her goods, she practically continuing the business of her husband. It was held that when payments were made on account, the plaintiff could rightfully credit them on the indebtedness of the husband.

B. Change in Method of Bookkeeping.—A change in the method of bookkeeping is not such an interruption of the running of an account as to prevent the application of the rule of imputing a payment to the earliest items: *Goldsmith v. Lewine*, 70 Ark. 516, 69 S. W. 308.

V. Illegal and Unenforceable Demands.**a. Illegal.**

1. Application by Debtor.—Where one of the debts or items of an account is illegal and the others valid, the debtor may, at his option, apply a payment to either: *Rohan v. Hanson*, 65 Mass. (11 Cush.) 44; *Williamson v. New Jersey etc. R. R. Co.*, 28 N. J. Eq. 277; *Johnston v. Dahlgren*, 62 N. Y. Supp. 1115, 48 App. Div. 537. In such a case, an appropriation upon the illegal claim is as valid and binding upon the debtor as if it were legal, and he cannot subsequently, without the creditor's consent, change it, and have it applied to the legal demand: *Brown v. Burns*, 67 Me. 535; *Dorsey v. Wayman*, 6 Gill (Md.), 59; *Hubbell v. Flint*, 81 Mass. (15 Gray) 550; *Caldwell v. Wentworth*, 14 N. H. 431; *Feldman v. Gamble*, 26 N. J. Eq. 494. And the same holds good where payment is made and applied by the creditor to illegal items, under a previous agreement: *Richardson v. Woodbury*, 66 Mass. (12 Cush.) 279. So where the account consisted partly of items for liquor sold in violation of law, and it was agreed that payments made should be credited on the liquor accounts, the court held that though the agreement was void and the money could be recovered back in a proper action, payments already applied could not be diverted from those items and applied to others: *Tomlinson etc. Co. v. Kinsella*, 31 Conn. 268; and see, also, *Treadwell v. Moore*, 34 Me. 112.

2. Application by Creditor.—The creditor, however, can appropriate payments only to legal, valid demands: *Phillips v. Moses*, 65 Me. 70; *Rohan v. Hanson*, 65 Mass. (11 Cush.) 44; *Kidder v. Norris*, 18 N. H. 532; *Gammon v. Plaisted*, 51 N. H. 444; *Bancroft v. Dumas*, 21 Vt. 456. But the debtor may ratify the act of the creditor. So where a sufficient amount is paid on a bill, and applied by the creditor to discharge the illegal items, and a statement of the account, omitting the illegal items, be sent the debtor, who expresses his willingness to pay the same, the application to the illegal items is deemed voluntary on his part, and he is bound thereby: *Plummer v. Erskine*, 51 Me. 59.

3. Application by Law.

A. Legal Items Favored.—Neither parties having directed the application, the law will, of course, prefer a valid demand to an invalid one, and will make the application accordingly: *Quigley v. Duffey*, 52 Iowa, 610, 3 N. W. 659; *Treadwell v. Moore*, 34 Me. 112; *Solomon v. Dreschler*, 4 Minn. 278; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. Rep. 781; *Huffstater v. Hayes*, 64 Barb. 573; *Emery v. Tichout*, 13 Vt. 15; and this rule applies with equal force to the items of an account: *Dunbar v. Garrity*, 58 N. H. 575; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187.

Where a deed of trust is void in part and valid in part, a payment will be applied to the discharge of the valid portion: *Wingate v. Association*, 15 Tex. Civ. App. 416, 39 S. W. 999. So payments

by a married woman must be applied to her valid indebtedness, and not to a bond signed by her, but void by law: *Kuker v. McIntyre*, 43 S. C. 117, 20 S. E. 796.

B. Illegal Paid from Surplus.—If there be more paid than is actually due on the legal debts, the law will impute the surplus to the illegal items, and it will not be presumed to be a payment in advance for a legal debt to be afterward contracted: *Keane v. Branden*, 12 La. Ann. 20; *Hall v. Clement*, 41 N. H. 166.

b. Unenforceable.

1. Statute of Limitations.

A. Where Some Barred.—A distinction is made between invalid or illegal demands, just discussed, and those which are merely unenforceable, as where barred by time, the statute of frauds, infancy, and the like. In such cases more conflict is apparent among the authorities.

There is no doubt that a debtor may pay an outlawed debt if he so desires: *Sitterly v. Gregg*, 22 Hun, 258; and a creditor is generally accorded the right of applying an unappropriated payment to a statute barred debt. In the latter case the authorities are not in harmony as to the effect of such appropriation by the creditor, the doctrine of one line of cases being that the payment should be pro tanto only and not revive the balance of the debt: *Armistead v. Brooke*, 18 Ark. 521; *Pond v. Williams*, 67 Mass. (1 Gray) 630. The other view, that the entire debt is revived, by a partial application on the part of the creditor, has also authority in its favor: *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366; and the reason is thus expressed in that case: "The doctrine is well settled, in this state, at least, that a debt secured by a note, upon which the right of action was barred by the statute of limitations, is not thereby extinguished or paid, but the debt still remains due; and if the person can, by resorting to any other means than an action upon the note, recover his money, he may do so; and this, because the debt is not regarded as paid, but as still due, though not enforceable by an ordinary action at law. . . . The action is barred, but the debt is not extinguished, and, on the contrary, remains still due. If this be so, then it follows that, upon the same principle, a creditor who holds two notes against a debtor, one of which is barred by the statute and the other is not, when he receives a payment from his debtor, who gives no directions at the time as to the application of the money paid, may apply the same to the note which, though barred by the statute, still remains a valid debt, and thus revives a right of action for the balance really due. If the debtor gives no direction as to the application of the money which he pays, and if the rule be as above stated, then the debtor must be regarded as having assented to whatever application the creditor chooses to make; and if he applies it to the note which is barred by the statute, the debtor must, in law, be assumed to have assented to such applica-

tion; and if so, then, by the express terms of the statute, the right of action for the balance remaining unpaid is revived."

The bar of the statute of limitations is not removed by a general payment on a debt not known by the debtor to exist, as it could not be made under circumstances indicating a willingness to pay, the presumption that the debtor intends to keep alive all his obligations applying only to such as he knows the creditor to hold against him: *Camp v. Smith*, 48 Hun, 621, 1 N. Y. Supp. 375.

Where not intended or supposed by the parties to be appropriated to an outlawed claim, such application cannot be made: *Krone v. Krone*, 38 Mich. 661.

B. Where all Barred.—Where the debts are all barred by the statute of limitations, it is held in *Taylor v. Foster*, 132 Mass. 30, that there is no reason why one should be paid more than another, and the payment may be apportioned to them all, thus taking the entire indebtedness out of the operation of the statute. In *Ayer v. Hawkins*, 19 Vt. 26, however, this is not allowed, and such division cannot be made so as to take them all out: See, also, *Wheeler v. House*, 27 Vt. 735.

C. Application by Law.—While courts will not apply a payment to an illegal demand, as a general rule, such is not always the case when the debt is merely unenforceable as by the statute of limitations, and if equity requires it, such payment will be imputed to the barred indebtedness: *Phipps v. Willis*, 11 Tex. Civ. App. 186, 32 S. W. 801. See, also, *Salnave v. McDonough*, 6 La. 357. But in *Morse v. Brandt*, 2 Mart., N. S., 515, it was held, proceeding upon the theory of benefiting the debtor, that the payment should not be so applied.

Where payment was made on an open account not dated or otherwise applied, it was held that the law would appropriate it to the first items, though statute barred, and the latter were not: *Fletcher v. Gillan*, 62 Miss. 8. But see *Livermore v. Rand*, 26 N. H. 85.

If two debts are both overdue, and a payment is made without direction as to its application, the law will impute it to that demand which, not barred at the time of payment, has since become unenforceable by reason of the statute, such being an equitable disposition of the fund: *Robinson v. Allison*, 36 Ala. 525. In *Estes v. Fry*, 166 Mo. 70, 65 S. W. 741, it was held just and equitable for the law to apply a payment to the note in suit, all the other debts being barred by the statute.

2. Statute of Frauds, Infancy, Bankruptcy.—Where the debt is unenforceable by the statute of frauds, a general payment may be appropriated by a creditor to such debt: *Murphy v. Webber*, 61 Me. 478; *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109.

In *Thurlow v. Gilmore*, 40 Me. 378, payment was applied to the earliest items of an account, though the debtor was an infant when the account was commenced, but not afterward.

As to the application by a creditor to the oldest items, although the debtor became bankrupt, being valid, see *Hill v. Robbins*, 22 Mich. 475.

VI. Principal and Interest.

a. Legal Interest.

1. General Rule.—The doctrine of the application of payments thus far treated has been confined to cases where the debtor owes the creditor two or more debts. It has reference, however, also to where there is but one debt, provided it bears interest; and the general rule may be stated to be that it will be applied first to the interest accrued up to the date of payment and the residue, if any, to the principal: *Coleman v. Smith*, 55 Ala. 368; *Bradley v. Murray*, 66 Ala. 269; *London etc. Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; *Donaldson v. Cothran*, 60 Ga. 603; *Jacobs v. Ballenger*, 130 Ind. 231, 29 N. E. 782; *Steele v. Taylor*, 34 Ky. (4 Dana.) 445; *Shaw v. Oakey*, 3 Rob. (La.) 361; *Union Bank v. Kindrick*, 10 Rob. (La.) 51; *Frazier v. Hyland*, 1 Har. & J. (Md.) 98; *Fay v. Bradley*, 18 Mass. (1 Pick.) 194; *Weide v. St. Paul*, 62 Minn. 67, 64 N. W. 65; *Bond v. Jones*, 16 Miss. (8 Smedes & M.) 368; *Hamer v. Kirkwood*, 25 Miss. 95; *Anderson v. Perkins*, 10 Mont. 154, 25 Pac. 92; *Hart v. Dewey*, 2 Paige, 207 Merchants' Bank v. Freeman, 15 Hun, 359; *Peck v. Granite etc. Assn.*, 46 N. Y. Supp. 1042, 21 Misc. Rep. 84; *Peebles v. Gee*, 12 N. C. (1 Dev. L.) 341; *Johnson v. Johnson*, 58 N. C. (5 Jones Eq.) 167; *Spires v. Hamot*, 8 Watts & S. (Pa.) 17; *Moore v. Kiff*, 78 Pa. St. 96; *De Brahl v. Neuffer*, 1 Strob. (S. C.) 426; *Smith v. Macon*, 1 Hill Eq. (S. C.) 339; *Hampton v. Dean*, 4 Tex. 455; *Smith v. Woods*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 680; *Allen v. Lyman*, 27 Vt. 20.

Where it is agreed that no interest shall be charged, a payment should be applied to the principal: *Mendel v. Paepke*, 69 Wis. 527, 34 N. W. 912; and where no interest is due at the time of payment, it should be applied to the principal: *Ross v. Rees*, 19 Ky. Law Rep. 1215, 43 S. W. 215; and not to future or unearned interest: *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514. Where neither principal nor interest are due when the payment is made, it should be applied to the extinguishment of principal and interest ratably: *Jencks v. Alexander*, 11 Paige, 619.

2. No Choice in Debtor.—The law favors the payment of the interest first to such an extent that the debtor must apply it thereto. The reason for this is set forth in *Tooke v. Bonds*, 29 Tex. 419, where the court, after stating the general rule as to the power of the debtor to direct the appropriation, continues: "When, however, the claim of the creditor is a single debt, consisting of principal and interest, the debtor certainly cannot, as a matter of right, make partial payments, and appropriate them to the extinguishment of the principal, in advance of the discharge of the interest. If he were permitted to do so, he could without the consent of the cred-

itor, change the legal effect of the contract, by which the unpaid balance, not including interest, bears interest until the entire debts are discharged. But there is no reason why this may not be done by the mutual assent of the parties. And although the creditor is not bound to accept such partial payment, yet if the debtor makes it upon the stipulation and agreement that it shall be applied in satisfaction of the principal, and not of the interest, and it is so accepted and appropriated by the creditor, the principal is thereby extinguished and discharged, and the creditor cannot be permitted, without the consent of the debtor, to shift the application of such payment from the principal to the interest; nor will the law do so for him." See in accord *Smith v. Nettles*, 9 La. Ann. 455; *Johnson v. Succession of Robbins*, 20 La. Ann. 569; *Gwinn v. Whitaker*, 1 Har. & J. (Md.) 754. See, also, *Donaldson v. Cothran*, 60 Ga. 603. The Virginia courts hold that the debtor may apply a payment to the principal, and if the creditor accepts it he must obey the direction: *Pindall v. Bank etc.* 10 Leigh, 481; *Miller v. Trevilian*, 2 Rob. (Va.) 1.

If the payment is directed to be applied to the principal, the fact that it was so made, intended and understood should be clear and conclusive: *Carter v. Sanderson*, 19 Ky. Law Rep. 620, 41 S. W. 306.

3. Where Received Before Debt is Due.—A different rule is held to apply, in *Starr v. Richmond*, 30 Ill. 276, 83 Am. Dec. 189, where the holder receives the money before it is due, and in such a case a payment should be applied to the principal.

4. Where Several Debts Bear Interest.—Where there are several notes maturing at different dates, and after all are due a payment is made, it will be applied to the principal and interest of the note first falling due in preference to interest on the others: *Miller v. Leflore*, 32 Miss. 634. See, also, *Trimble v. McCormick*, 12 Ky. Law Rep. 857, 15 S. W. 358.

Where, on an installment contract, a small amount of interest, but none of the principal, was due, it was held that the law would first discharge the interest and then apply the residue ratably on each of the installments: *Righter v. Stall*, 3 Sand. Ch. 608.

5. Method of Computing Interest.—As to the method of computing interest, it is stated by Chancellor Kent to be as follows: "The rule for casting interest when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be ap-

plied toward discharging the principal, and interest is to be computed on the balance as aforesaid": *Connecticut v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471. This is the most general rule, and in some states has been confirmed by statute: *Anderson v. Perkins*, 10 Mont. 154, 25 Pac. 92, citing *Story v. Livingston*, 13 Pet. 359; *Backus v. Minor*, 3 Cal. 230; *Estate of Den*, 35 Cal. 692. See in accord *Wallace v. Glaser*, 82 Mich. 190, 21 Am. St. Rep. 556, 46 N. W. 227.

As to the mode of computation before either principal or interest are due, see *De Bruhl v. Neuffer*, 1 Strob. (S. C.) 426.

For other cases in which the rules for computing interest are set forth, see *McCormick v. Mitchell*, 57 Ind. 248; *Hynson v. Maddens*, 1 Mart., N. S., 571; *Martinstein v. His Creditors*, 8 Rob. (La.) 6; *Miami etc. Co. v. Bank of United States*, 5 Ohio, 260.

Interest is never allowed to form a part of the principal so as to carry interest: *Dean v. Williams*, 17 Mass. 417; *Bradford Academy v. Grover*, 55 Vt. 462; *Bogges v. Goff*, 47 W. Va. 139, 34 S. E. 741. A compound of interest is said to be avoided by the court whenever possible, in *Hammer v. Nevill*, *Wright* (Ohio), 169; but see *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115, in which case the interest was payable annually, and interest allowed upon interest.

b. Usurious Interest.—Where the interest upon the debt is usurious, payments made generally will be applied to discharge the principal, the stipulation for interest having no binding force: *Hynes v. Cobb*, 2 La. Ann. 363; *Fay v. Lovejoy*, 20 Wis. 403; *Loveridge v. Larned*, 7 Feb. 294. See, also, *El Paso etc. Assn. v. Lane*, 81 Tex. 369, 17 S. W. 77. A borrower may elect to treat all payments made by him as payments first of the interest then due, and then of the principal, and there can be no payment of usury so as to prevent this election so long as any part of the principal, with legal interest, remains unpaid: *Bank etc. v. Coke*, 20 Ky. Law Rep. 867, 45 S. W. 867. Where, however, a debtor has actually paid off a usurious note, he cannot afterward withdraw it and apply it upon another indebtedness, although he might maintain an action to recover it: *Rackley v. Pearce*, 1 Ga. 241. See, also, *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300. That usury should be pleaded to be taken advantage of, see *Boagni v. Pickett*, 28 La. Ann. 606.

c. Excessive Interest.—If the maker of a note pays more interest than by law he need after its maturity, it is held in *Camden Sav. Bank v. Cilley*, 83 Me. 72, 21 Atl. 746, in the absence of fraud, the debtor cannot have the excess of interest above the regular rate applied to the principal. But where a debtor paid, by mistake, more than the legal rate upon a decree of foreclosure, it was held that he was entitled to have the excess credited on the decree: *Deshler v. Holmes*, 44 N. J. Eq. 581, 18 Atl. 75. So where interest is paid by mistake where none is allowable, it should be applied to the principal: *Carr v. Robinson*, 71 Ky. (8 Bush) 269. And see *Moore v. Holland*, 16 S. C. 15.

Where a statute provides that no recovery of interest above ten per cent can be had, unless the contract is in writing, it is not unlawful, and money paid without appropriation by the debtor may be applied by the creditor to interest above that rate, although not in writing: *Marye v. Strouse*, 5 Fed. 483, 6 Saw. 204.

A surety cannot object if his principal pays more than the legal rate of interest, and it is applied thereto: *Allen v. Jones*, 8 Minn. 202.

VII. Time of Application.

a. **For Debtor.**—As to when the right of application should be exercised, the general rule undoubtedly is that the debtor should direct it at or before the time of payment, as after that time the money is his no longer: *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Bell v. Radcliff*, 32 Ark. 645; *Sherwood v. Haight*, 26 Conn. 432; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Taylor v. Jones*, 1 Ind. 17; *Hillyer v. Vaughan*, 24 Ky. (1 J. J. Marsh.) 583; *Murray v. Schneider* (Neb.) 90 N. W. 206; *Pattison v. Hull*, 9 Cow. 747; *Bank of California v. Webb*, 94 N. Y. 467; *Long v. Miller*, 93 N. C. 233; *First Nat. Bank v. Roberts*, 2 N. Dak. 195, 49 N. W. 722; *Reynolds v. McFarlane*, 1 Tenn. (1 Over.) 488; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427; *Buster v. Holland*, 27 W. Va. 510; *Johnston v. Northwestern etc. Ins. Co.*, 107 Wis. 337, 83 N. W. 641. But see *Petty v. Dill*, 53 Ala. 641; *Huffman v. Cauble*, 86 Ind. 591, holding that the debtor may apply at any time before the creditor has done so. A debtor may apply after suit, if made in accordance with an agreement repudiated by the creditor: *Littleton v. Harris*, 69 Mo. App. 596.

b. For Creditor.

1. **Before Suit.**—According to the doctrine of the civil law, the creditor, as well as the debtor, was forced to make his election at the time of payment: *Heilbron v. Bissell*, Bail. Eq. (S. C.) 430; but at common law, he is not required to exercise his right immediately: *Hughes v. Johnson*, 38 Ark. 285; *Pattison v. Hull*, 9 Cow. 747; *Sanford v. Van Arsdall*, 53 Hun, 70, 6 N. Y. Supp. 494; *Alexandria v. Patten*, 7 U. S. (4 Cranch) 317; *Jones v. United States*, 48 U. S. (7 How.) 681.

While all agreeing that the application need not be made by the creditor at the very time of payment, the authorities are not in harmony as to how soon thereafter it should be exercised: *Taylor v. Coleman*, 20 Tex. 772. One view, supported by the weight of authority is that it should be applied before suit brought: *Plummer v. Erskine*, 58 Me. 59; *Bank of California v. Webb*, 94 N. Y. 467; *Jenkins v. Beal*, 70 N. C. 440; *Miller v. Womble*, 122 N. C. 135, 29 S. E. 102; *Thatcher v. Tillory* (Tex. Civ. App.), 70 S. W. 782; *Lowery v. Dickson*, 1 White & W. Civ. Cas. Ct. Ap. (Tex.), sec. 497; *Pierce v. Knight*, 31 Vt. 701; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427. See, also, *Buster v. Holland*, 27 W. Va. 510; *L'Hommedieu v. The H. L. Dayton*, 38 Fed. 926.

2. Within a Reasonable Time.—Another view holds that it must be made within a reasonable time: *Starrett v. Barber*, 20 Me. 457; *Allen v. Culver*, 3 Denio, 284; *Briggs v. Williams*, 2 Vt. 283; and this is modified by requiring that it be done before action: *Moss v. Adams*, 39 N. C. (4 Ired. Eq.) 42; and appropriation at the trial is too late: *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691.

3. Till Verdict or Judgment.—In South Carolina, the creditor has till verdict or judgment to make his election, and not only till suit brought: *Brice v. Hamilton*, 12 S. C. 32; *Bell v. Bell*, 20 S. C. 34; *Thatcher v. Massey*, 20 S. C. 542; *Baum v. Trantham*, 42 S. C. 104, 46 Am. St. Rep. 697, 19 S. E. 973; and in *The Mecca*, [1897] App. Cas. 286, an English case, it is held to be the settled law that the creditor has “up to the very last moment” in which to manifest his application.

4. Before Controversy.—Other cases hold that no application can be made after a controversy has arisen, and that the duty then devolves upon the court: *Johnson v. Thomas*, 77 Ala. 367; *Lazarus v. Freidheim*, 51 Ark. 371, 11 S. W. 518; *Russell v. Metzgar*, 2 Ind. 345; *Applegate v. Koons*, 74 Ind. 247; *Milliken v. Tufts*, 31 Me. 497; *Chapman v. Commonwealth*, 25 Gratt. (Va.) 721; *Norris v. Beaty*, 6 W. Va. 477; *United States v. Kirkpatrick*, 9 Wheat. 720. See, also, *Haynes v. Waite*, 14 Cal. 446, restricting this rule.

In *Hinckley v. Krug* (Cal.), 34 Pac. 118, it was held that a payment made to an attorney on account of fees for legal services could not be credited by him on certain items of the account, so as to place them beyond controversy.

VIII. Bonds of Officials.

An exception to the general rule in regard to the application of payments exists in the cases of several successive bonds being given to insure the fidelity and diligence of a public officer, and payments received must be applied so as to give each bond credit for whatever was collected and paid thereunder. In *Postmaster General v. Norvell*, Fed. Cas. No. 11,310 (Gilp. 106), it was said: “Here a public officer, in the receipt of public money, has given sureties for the faithful performance of his duties, and for the accounting for and payment of all the moneys which shall come to his hands. The sureties remain for several years, and then a new bond, with new sureties, is given; at which time there is a large sum of money actually due to the public, and for which the sureties on the first bond were liable; that is to say, the penalty of the first bond was actually forfeited, and the amount of the defalcation due, and recoverable from the sureties in it. Can the government, for whose security both bonds were given, apply the moneys collected by the officer after and under the second bond, and on the responsibility of the sureties in the second bond, to the payment or credit of the

balance due on moneys collected, and which ought to have been paid, by and under the first bond? Can the burden actually resting upon the first sureties, can the forfeiture actually incurred by them, be shifted by the process of appropriation, without the consent or knowledge of the second surety, from the shoulders of the first, and be put upon the second? I am of opinion, most clearly, that it cannot; that each set of sureties must answer for its own defaults, and is entitled to be credited with its own payments. If authority can be required to sustain a principle of such obvious justice, it will be found in the case of *United States v. January*, 7 Cranch, 372." See to the same effect, *Anaheim etc. Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048; *Pickering v. Day*, 2 Del. Ch. 333; *Chapman v. Commonwealth*, 25 Gratt. (Va.) 721; *Myers v. United States*, 1 McLean, 493, Fed. Cas. No. 9996; *United States v. Linn*, 2 McLean, 501, Fed. Cas. No. 15,606.

The law does not, however, presume that payments made by an officer in his second term are made out of revenue collected by him from the funds of that term, and in extinguishment of his liabilities incurred during that time: *St. Joseph v. Merlatt*, 26 Mo. 233, 72 Am. Dec. 207; and see, also, *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204.

IX. Rights of Third Persons.

The general rule as to the application of payments is that the parties thereto alone are to be considered, and third persons cannot, as a rule, insist upon a particular application, that right being only in the parties: *Hanson v. Rounsavell*, 74 Ill. 238; *Frazier v. Lananhan*, 71 Md. 131, 17 Am. St. Rep. 516, 17 Atl. 940; *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 71 N. W. 624; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Gordon v. Hobart*, 2 Story, 243, Fed. Cas. No. 5608.

A regular appropriation of a payment is binding upon a surety as well as the parties: *Allen v. Culver*, 3 Denio, 284; and need not be so applied as to relieve a surety on a secured debt: *Brewer v. Knapp*, 18 Mass. (1 Pick.) 332. So if the principal maker of a note, after its maturity, makes a payment with directions for the payee to apply it on the note, he is bound to do so, and if he fails the law will, irrespective of any agreement between the payee and a surety: *Trentman v. Fletcher*, 100 Ind. 105.

Where a cashier is indebted by notes to a bank employing him and then breaches his bond, the bank has a right to apply toward the payment of such notes a balance on their books in favor of the cashier, and need not apply it in reduction of damages for the breach of the bond: *Dedham Bank v. Chickering*, 21 Mass. (4 Pick.) 314. And where such officer takes more than the penal sum of his bond, the bank need not apply the money received from other sources thereon, but may impute it to the excess above the sum in the bond: *Phillips v. Bossard*, 35 Fed. 99.

The holder of a deed of trust securing two notes, with different sureties on each, may apply the proceeds of sale on foreclosure, if not enough to pay both notes, in such a way as to receive the benefit of both securities, regardless of the dates of maturity of the notes: *Sturgeon Sav. Bank v. Riggs*, 72 Mo. App. 239.

Where a transfer of property is made by an officer for the benefit of his sureties, the person or corporation receiving it must so apply it, and cannot credit it on another indebtedness: *Huntington etc. Assn. v. Cast* (Ind.), 67 N. E. 921. And where the surety gives the money to pay off the debt on which he is bound, and the creditor receives it with knowledge of that fact, he must so apply it, although he refuses to do so, and appropriates it on another debt: *Reed v. Boardman*, 37 Mass. (20 Pick.) 441.

In some authorities it is held that the rules regarding the application of payments cannot be enforced to the prejudice of third persons: *Griffin v. His Creditors*, 6 Rob. (La.) 216; *Burbank v. Buhler*, 108 La. 39, 32 South. 201. See, also, *Andrew v. Exchange Bank*, 108 Ga. 802, 34 S. E. 183. And that the sureties are entitled to protection by the court: *Drake v. Sherman*, 179 Ill. 362, 53 N. E. 628; *Bond v. Armstrong*, 88 Ind. 65.

The proceeds of collateral security given to secure a note cannot be applied to the payment of other debts of the maker, but must be applied to payment of the note, in exoneration of the indorsers: *First Nat. Bank v. Scott*, 123 N. C. 538, 31 S. E. 819. Where a creditor has a mortgage covering two notes, on one of which the mortgagor is principal alone and on the other joint principal, the creditor cannot apply the proceeds of the sale of the mortgaged premises to the note in which the two are joint principals, to the prejudice of the sureties on the other note: *Merrimac County Bank v. Brown*, 12 N. H. 320.

See, also, the rights of third persons, in regard to application made by a creditor, in II, g, 1 and 2 herein.

X. Change of Application.

a. As Between the Parties.—Where a payment has been absolutely applied, it is irrevocable and cannot be changed: *McMaster v. Merriek*, 41 Mich. 505, 2 N. W. 895; *Grasser etc. Co. v. Rogers*, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445, citing *Chapman v. Commonwealth*, 25 Gratt. (Va.) 721. The mere writing of an indorsement on the back of a note, without knowledge thereof by the maker, is not, however, an irrevocable application of the money so indorsed, where there are other debts: *Lau v. Blomberg* (Iowa), 91 N. W. 206.

The creditor having made the application, cannot by his act alone change it: *Wendt v. Ross*, 33 Cal. 650; *White v. Costigan* (Cal.), 72 Pac. 178; *Jackson v. Bailey*, 12 Ill. 159; *Hahn v. Geiger*, 96 Ill. App. 104; *Martin v. Draher*, 5 Watts (Pa.), 544; *Black v. Shooler*, 2 McCord (S. C.), 293; *Eyler v. Read*, 60 Tex. 387; *Kinnear*

v. Dilley, 3 Wills. Civ. Cas. Ct. App. (Tex.), sec. 406; Chapman v. Commonwealth, 25 Gratt. 721; The Asiatic Prince, 108 Fed. 287, 47 C. C. A. 325.

Where a debtor has accepted a receipt, in which payment is applied to a particular debt, it is revocable only in cases of surprise and fraud by the creditor: Flower v. O'Bannon, 43 La. Ann. 1042, 10 South. 376. If the creditor changes an application and the debtor acquiesces therein, this is a ratification of such subsequent appropriation: Cardinell v. O'Dowd, 43 Cal. 586; and where payment is imputed to a debt other than that intended, and the debtor consents, he cannot afterward insist that there was error in such payment: Dorsey v. Wayman, 6 Gill (Md.), 59. See, also, Flarsheim v. Brestrup, 43 Minn. 298, 45 N. W. 438.

A payment applied by a creditor and subsequently ratified by the debtor speaks from that date, although in the interval the creditor becomes the holder of another claim against the debtor, to which he his sureties might otherwise have required it to be applied: Metoyer v. Trezzini, 6 Rob. (La.) 124.

The parties may, of course, by mutual agreement change the application, and then the indebtedness first discharged is revived by law: Rundlett v. Small, 25 Me. 29; Plummer v. Erskine, 58 Me. 59; Flarsheim v. Brestrup, 43 Minn. 298, 45 N. W. 438.

Where there is no fraud upon third parties, an application remains as made between the debtor and creditor: Merchants' etc. Bank v. Hervey Plow Co., 45 La. Ann. 1214, 14 South. 139; Hughes v. Mattes, 104 La. 231, 28 South. 1009; and the court will not change it: Pond etc. Co. v. O'Connor, 70 Minn. 266, 73 N. W. 159, 248; Watts v. Hoch, 25 Pa. St. 411; Pitzer v. Logan, 85 Va. 374, 7 S. E. 385.

b. When Rights of Others Involved.—The parties cannot even by mutual agreement change an application to the prejudice of a third person, without his consent: Pinney v. French (Kan.), 73 Pac. 94; Terhune v. Colton, 12 N. J. Eq. 232, 312; Berghaus v. Alter, 9 Watts (Pa.), 386. So the application of a payment made by an insolvent debtor to a senior mortgagee cannot subsequently be changed to the prejudice of a junior mortgagee. "To the extent of the payment the mortgage had been annulled. It was not possible under the circumstances to revivify it and give new life to that part of a mortgage annulled to the prejudice of plaintiff's fellow-mortgagee. It would be giving an advantage never contemplated by the law-making power, if the mortgage creditor first in rank could thus lessen the chances of recovery of amount due to a creditor with mortgage second in rank": Boagni v. Wartelle, 50 La. Ann. 128, 23 South. 206.

Where one joint debtor makes a payment on a joint debt, it extinguishes it pro tanto, and the debtor who paid and the creditor cannot by any agreement change the appropriation, and thus revive

the claim without the consent of the other joint debtor: *Miller v. Montgomery*, 31 Ill. 350; *Thayer v. Denton*, 4 Mich. 192. Nor can the appropriation by a partner to a partnership obligation be, after a long time, appropriated to the payment of a prior claim of one of the partners: *Codman v. Armstrong*, 28 Me. 91.

XI. The Application, and How Manifested.

a. By Debtor.

1. By Circumstances.—The authorities are harmonious upon the point that the debtor need not, at the time of payment, direct the application in so many words, but it is sufficient if from all the attending circumstances it may be inferred: *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; *Bayley v. Wynkoop*, 10 Ill. 449; *Howland v. Rench*, 7 Blackf. (Ind.) 236; *Phillips v. Moses*, 65 Me. 70; *Champenois v. Fort*, 45 Miss. 355; *Sawyer v. Tappan*, 14 N. H. 352; *Woodruff v. McIntyre* (N. J.), 14 Atl. 572; *Berrian v. Mayor of New York*, 27 N. Y. Super. Ct. (4 Rob.) 538; *Pardee v. Markle*, 111 Pa. St. 548, 56 Am. Rep. 299, 5 Atl. 36; *Bray v. Crain*, 59 Tex. 649; *Cass v. McDonald*, 39 Vt. 65; *Roakes v. Bailey*, 55 Vt. 542; *Corliss v. Grow*, 58 Vt. 702, 2 Atl. 388. It is for the jury to find from the facts whether a direction as to the application was given, which need not be an express declaration to that effect: *Moorehead v. West Branch Bank*, 3 Watts & S. (Pa.) 550. Thus a positive refusal to pay one debt and an acknowledgment of another, with a delivery of the sum due upon it, is such a circumstance: *Tayloe v. Sandiford*, 7 Wheat. 13; and the expression of a wish on the part of the debtor as to the application would amount to a direction to that effect: *Hanson v. Rounsavell*, 74 Ill. 238. See, also, *Adams Exp. Co. v. Black*, 62 Ind. 128.

The mere fact, however, that payment was made through a security of the debtor, with the debtor's money, does not give rise to an inference that it was intended to be applied to the debt for which he was security: *Mitchell v. Dall*, 4 Gill & J. (Md.) 361.

2. By Known Intent.—Where the debtor pays with the intention of having it applied to a certain debt, of which intention the creditor is aware, it is sufficient to fix the application: *Hanson v. Cordano*, 96 Cal. 441, 31 Pac. 457; *Bank of Alexandria v. Saunders*, 2 Cranch C. C. 183, Fed. Cas. No. 852; but a mere naked intent on the part of the debtor, undisclosed to the creditor, does not bind the latter: *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; and cannot be allowed to be proven: *Brice v. Hamilton*, 12 S. C. 32.

It is held in *Bonaffé v. Woodberry*, 29 Mass. (12 Pick.) 456, that where the debtor pays with one intent and the creditor accepts with another, the former prevails.

Where the debtor is cognizant of one indebtedness only, a payment must be applied thereon, as his intention can be to pay only such debt. So where a debtor owes a note to a firm, and sends them a payment, it must be applied thereto, although the firm had bought

two other notes against him, of which he was ignorant: *Holley v. Hardeman*, 76 Ga. 328.

3. What is a Sufficient Application.—An agreement between the parties is equivalent to a direction by the debtor as to the application: *Hahn v. Geiger*, 96 Ill. App. 104. If money be paid with reference to the release of a mortgage held by the creditor, this is a sufficient direction of application to that debt: *Lazarus v. Henrietta Nat. Bank*, 72 Tex. 354 10 S. W. 252; and orders designating where the materials bought are to be used is equivalent to a direction: *Western etc. Co. v. Young*, 48 Mo. App. 505. An order directing payment by a drawee of money to a third person, with direction to charge it to a certain account between the drawer and drawee, when accepted and paid, is a contract definitely applying payment to said account: *Hassard v. Tomkins*, 108 Wis. 186, 84 N. W. 174. As to the setting apart of a specific fund by the debtor, being an appropriation, see *Ketchum v. St. Louis*, 101 U. S. 306.

A provision in a mortgage, that the net proceeds of a sale made thereunder should be applied to the mortgage debt and the surplus returned to the mortgagor, is not an application of such surplus: *Baum v. Trantham*, 42 S. C. 104, 46 Am. St. Rep. 697, 19 S. E. 973, where the court said: "Such a provision can, in no proper sense, be regarded as a direction by the mortgagor to apply any surplus of the proceeds of the sale to any particular debt. It is nothing more than an express declaration of what the law would necessarily imply without such declaration, to wit, that the mortgagee, upon breach of the condition of the mortgage, becomes the legal owner of the mortgaged property, and as such may seize and sell the same in satisfaction of the mortgage debt, subject, however, to an equity, upon the part of the mortgagor to require an accounting from the mortgagee for the proceeds of the sale, but in such accounting the mortgagee is entitled to credit for any unsecured claims which he may hold against the mortgagor."

4. Silence of Debtor.—No objection by a debtor to an application by his creditor amounts to consent on his part: *McLear v. Succession of Hunsicker*, 30 La. Ann. 1225; *Baker v. Smith*, 44 La. Ann. 925, 11 South. 585. The silence of a debtor to a misappropriation by the creditor is held in *Eylar v. Read*, 60 Tex. 387, not to work an estoppel.

b. By Creditor.—As to application by the creditor, the performance of some act indicating an intention to appropriate is sufficient: *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; *The Mecca*, [1897] App. Cas. 286; and the rule that circumstances may show the appropriation applies equally to a creditor: *Bayley v. Wynkoop*, 10 Ill. 449; *Howland v. Rench*, 7 Blackf. (Ind.) 236. The creditor need not notify the debtor of the manner of appropriation: *Callahan v. Boazman*, 21 Ala. 246; *Johnson v. Thomas*, 77 Ala. 367. And bringing suit on one claim shows an application to the

other: *Haynes v. Waite*, 14 Cal. 446; *Starrett v. Barber*, 20 Mo. 457; *Allen v. Kimball*, 40 Mass. (23 Pick.) 473; *Upham v. Lefavour*, 52 Mass. (11 Met.) 174.

A creditor cannot apply a payment to an unenforceable demand by merely expressing his wishes to the debtor, unless the latter assent thereto, or by not objecting to a positive statement to such application: *Sitterly v. Gregg*, 22 Hun, 258. A right in the creditor to "dispose" of the proceeds of goods is different from an application of payment: *Sproule v. Samuel*, 5 Ill. 135.

XII. Evidence of Application.

a. Books of Account.—A private entry made by a debtor in his books of account is insufficient to determine the application of a payment: *Terhune v. Colton*, 12 N. J. Eq. 232, 312; but such books are admissible in evidence to show that an account therein is unpaid and unsecured, whereas another debt is secured, that equity may apply payment to the former: *McQuaide v. Stewart*, 48 Pa. St. 198. In *Cole v. Trull*, 26 Mass. (9 Pick.) 325, an entry in the creditor's books was held evidence of appropriation; but the right of election is not conclusively shown by book entries until communicated to the other party: *Reiss v. Schermer*, 87 Ill. App. 84; *Allen v. Culver*, 3 Denio, 284. Books of account may be explained, though on their face entries therein are inconsistent with an agreement made between the parties: *Mack v. Adler*, 22 Fed. 570.

b. Indorsements.—Indorsements on a note are not evidence of payment, but when there is evidence of payment, they become competent to show the application: *Young v. Alford*, 118 N. C. 215, 23 S. E. 973. An evidence of handwriting of a credit indorsed on a note, before proof of payment, while not competent as a direct proof of credit, is admissible as a circumstance tending to show an understanding between the parties that whenever the maker paid anything on the note for the payee's benefit, it was to be credited thereon: *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366.

A mere indorsement upon an account is no evidence that the creditor had authority to make an application thereon, and admitting it is reversible error. "By admitting it in evidence, the court, in effect, told that this paper, a mere copy of an ex parte entry, was a competent instrument in evidence to be considered by them, in a case where the sole issue was whether the party making the original had authority to do so. There is no principle which allows a party to thus bolster and prop up his evidence": *Craig v. Miller*, 103 Ill. 605.

c. Letters.—A letter directing payment by the debtor is the best evidence to show on what account such payment was received: *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; and a letter of the creditor to his debtor, at the time of payment, showing how the money had been

applied, together with the fact that the debtor failed to object thereto, is admissible in support of the creditor's contention, where the issue is whether a payment was intended to include a particular note: *Sweeney v. Pratt*, 70 Conn. 274, 66 Am. St. Rep. 101, 39 Atl. 182.

d. Statements of Account.—Application by a creditor can be shown by verbal declarations, or by an account rendered declaring the application: *Poulson v. Collier*, 18 Mo. App. 583; and the creditor's books of account are admissible to show to which of two accounts he applied the payment, if made at the time the entries bear date: *Van Rensselaer v. Roberts*, 5 Denio, 470; and the account itself with the credits thereon, is admissible, where there is testimony that payments were applied thereto: *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539. Statements of account between a creditor and a principal debtor are admissible as against a surety on a bond, to show the application of the payments and the consent of the principal debtor thereto: *White etc. Co. v. Fargo*, 51 Hun, 636, 3 N. Y. Supp. 494.

e. Recitals in Legal Instruments.—Where a debtor specified in a lease of property that the rent should be payable to his creditor, holding a mortgage, as long as the tenant occupied the property, or until the mortgage was paid off, this was held competent to show that the debtor intended the rents to be applied on the mortgage indebtedness: *Plain v. Roth*, 107 Ill. 588. A recital in a second mortgage as to the balance remaining unpaid on the note secured by the first is competent as showing an admission by the defendant that payments previously made had been properly applied: *Taylor v. Cockrell*, 80 Ala. 236.

f. Miscellaneous.—As to the admissibility of evidence showing the commencement of a suit and its subsequent dismissal for the purpose of showing an application of payment, see *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427.

That a bill may be evidence of application, see *Reynolds v. Patten*, 10 Misc. Rep. 155, 30 N. Y. Supp. 1050.

Where a plaintiff sues upon a promissory note, and it is brought out on cross-examination that the defendant had, subsequent to the delivery of the note, paid him money, he may testify that it was paid him on another claim: *Riche v. Martin*, 1 Misc. Rep. 285, 20 N. Y. Supp. 693. See, also, *Thorn v. Moore*, 21 Iowa, 285.

g. Burden of Proof.—If the debtor affirms that he directed the application, the burden is on him to prove it: *Levystein v. Whitman*, 59 Ala. 345; *Thatcher v. Massey*, 26 S. C. 155, 1 S. E. 465. See, also, *Trumbo v. Flournoy*, 77 Mo. App. 324. Where a creditor claims to have applied a payment to a debt other than the one in suit, the burden is on him to prove both debts, and the application of payments thereon: *Reid v. Wells*, 56 S. C. 435, 34 S. E. 401.

Where payment is made to a mortgagee after the execution of a mortgage, the presumption is that it was made on the mortgage debt,

and the person asserting it to have been made of another one is bound to prove it: *Tharp v. Feltz*, 45 Ky. (6 B. Mon.) 6.

XIII. Mistake.

It is generally held that a payment applied to an account or a debt by a mistake of fact does not prejudice the one making it, and will be applied to the proper indebtedness: *Livermore v. Claridge*, 33 Me. 428; *Burr v. Crompton*, 116 Mass. 493; *Commercial Bank v. MacDougall etc. Co.*, 8 App. Div. 1, 40 N. Y. Supp. 189; *Maury v. Mason*, 1 Hayw. & H. 400, Fed. Cas. No. 9314. See, however, *Read v. Mutual etc. Ins. Co.*, 5 N. Y. Super. Ct. (3 Sand.) 54.

Clear and convincing proof is required to disturb a direction by the debtor as to the application after the creditor's death on the ground of mistake of the debtor in the direction: *May v. Burns*, 19 Ky. Law Rep. 1595, 44 S. W. 83.

XIV. Voluntary and Involuntary Payments.

a. Voluntary Payments Defined.—The principles of law in regard to the application of payments refer only to such as are voluntarily made, and involuntary payments, such as under foreclosure or judicial sales are governed by different rules: *Bond v. Armstrong*, 88 Ind. 65; *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Blackstone Bank v. Hill*, 27 Mass. (10 Pick.) 129; *Orleans etc. Bank v. Moore*, 112 N. Y. 543, 8 Am. St. Rep. 775, 20 N. E. 357; *In re Georgi*, 21 Misc. Rep. 419, 47 N. Y. Supp. 1061; *Appeal of Pennsylvania Co. (Pa.)*, 7 Atl. 70; and a voluntary payment is held to be one made by a debtor on his own motion, and without any compulsory process: *Nichols v. Knowles*, 17 Fed. 494, 3 McCrary, 477.

b. Rules in Cases of Involuntary Payments.—The rules in the case of involuntary payments are briefly given in *Smith v. Moore*, 112 Iowa, 60, 83 N. W. 813, as follows: "The authorities seem to be in conflict on the rule for the application of involuntary payments. The doctrine that seems to be sustained by the weight of authority is that if payment is coerced by process of law, and the fund derived is not sufficient to pay all of two or more claims in suit, application will generally be to all ratably: See *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037; *Bank v. Brown*, 12 N. H. 320; *Orleans County Bank v. Moore*, 112 N. Y. 543, 8 Am. St. Rep. 775, 20 N. E. 357; *Jones v. Benedict*, 83 N. Y. 79; *Shelden v. Bennett*, 44 Mich. 634, 7 N. W. 223. We have not adopted this rule, however. Thus, in *Small v. Older*, 57 Iowa, 326, 10 N. W. 734, involuntary payments insufficient to pay all claims were so applied by the court as to pay the unsecured rather than the secured one, and the doctrine of pro rata payments was repudiated. Again, in *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. 357, involuntary payments were so applied by the court as to satisfy the unsecured, rather than the secured debts: See, also, *Citizens' Bank v. Whinery*, 111 Iowa, 390, 81 N. W. 694. This rule

is not without support in other jurisdictions: See *Nichols v. Knowles* (C. C.), 17 Fed. 494, 3 McCrary, 477; *Wilson v. Allen*, 11 Or. 154, 2 Pac. 91; *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38; *Mathews v. Switzler*, 46 Mo. 301; *President of Bank of Portland etc. v. Brown*, 22 Me. 295.''

ASHFORD v. ASHFORD.

[136 Ala. 631, 34 South. 10.]

ADVERSE POSSESSION—What Constitutes.—Adverse possession of land against the title is always wrongful until its long continuance has ripened title in the disseisor, and whether a wrongful possession is adverse always depends upon the character of the claim under which it is held. It must be hostile to the whole world and must be a claim of right against all persons, and not in subserviency to, or in recognition of, the title of the true owner. (p. 83.)

ADVERSE POSSESSION—Administrator and Heir.—If an administrator assumes that he has power and authority in that capacity to take possession of the lands of the decedent and hold them, and he does take and hold them under such supposed authority, though in fact he has no such power or authority, his possession, though wrongful, is not adverse to the heirs of the decedent, and can never become adverse to them so long as he claims to hold the land in his representative capacity. (pp. 83, 84.)

ADVERSE POSSESSION—Administrator and Heir.—If one takes possession of and holds land of a decedent as his administrator, and subsequently claims to hold it in his own right, such claim does not operate to give an adverse character to his possession, as against the heirs of the decedent, unless and until a knowledge of such claim is brought home to them. (pp. 84, 85.)

ADVERSE POSSESSION—Administrator and Heir—Husband and Wife.—If a person takes possession of land as administrator for a decedent, or at any time holds possession in that capacity, and while so in possession passes the possession over to his wife, but continues to reside on the land without visible marks of a change of possession, and no repudiation by him of the original character of his possession brought to the knowledge of the heirs of such decedent, they are entitled to recover against him and those claiming under his wife, however long such possession of the wife may have continued before suit brought. (p. 85.)

ADVERSE POSSESSION—Administrator and Heir—Husband and Wife—Evidence.—If an administrator as such takes possession of the lands of a decedent, and claims that such possession was afterward transferred to his wife, who held adversely to the heirs and in her individual capacity, evidence is admissible to show that the administrator took possession as such, and so held it at the time that his wife's possession began and continued, and a petition by him as administrator to sell the land for division among the heirs and the orders and proceedings thereon are admissible for this purpose. (p. 85.)

ADVERSE POSSESSION—Administrator and Heir—Husband and Wife—Evidence.—If an administrator takes possession of land of a decedent as his administrator, and claims that his possession

was afterward transferred to his wife, who held adversely to the heirs of such decedent, it is competent for them to prove in rebuttal of evidence to show notice to them of the nature of her possession, that during all of the time her husband lived with her on the land, gave in the taxes on the land, and paid them as administrator, and that after his wife's death he held himself out to the heirs as being in possession of the land as such administrator. (p. 86.)

EVIDENCE.—Statement of Conclusions of Fact by a witness is not admissible in evidence. (p. 87.)

COTENANCY.—Possession of One Cotenant is presumed to be the possession of all, and does not become adverse to the other cotenants unless they are actually ousted, or unless the adverse character of the possession of the one is actually known to the others, or is so open and notorious in its hostility and exclusiveness as to put the other cotenants on notice of its adverse character. (p. 87.)

D. A. Grayson, for the appellants.

Kirk, Carmichael & Rather, for the appellees.

635 McCLELLAN, C. J. Adverse possession of land against the title is always wrongful until its long continuance has ripened title in the disseisor. But it by no means follows that every wrongful possession is adverse to the true owner. Whether a wrongful or unauthorized possession is adverse depends, among other considerations, upon the character of the claim under which it is held. It must be hostile to the whole world. It must be a claim of right against all persons. It must not be in subserviency to or in recognition of the title of the true owner. If there is recognition of the true title, the possession is not adverse to that title, however wrongful or unauthorized it may be in every other aspect. Thus if A takes possession of the land of B, and holds it as and assuming to be the agent of B, when he is not B's agent, or, being the agent of B but without authority as such to enter upon and hold his principal's land, his possession, though wrongful and unauthorized, is no more adverse to B than if he were in fact the latter's agent and duly authorized to take and hold possession for him. So where the administrator of an estate assumes that he has power and authority in that **636** capacity to take possession of the lands of the decedent and hold them, and does take and hold them under the supposed authority of his office of administrator, though under the particular conditions of the estate he in fact has no such power or authority, his possession, wrongful and unauthorized as it is, is not adverse to the heirs of the decedent, since he holds the lands not as his own, but as the lands of the estate, and, of necessary consequence, in clear recognition of the title of the heirs; and his possession can never become adverse to

them so long as he claims to hold it in his representative capacity. The inquiry in all such cases is not whether the administrator has a right by virtue of his office to the possession, but whether in point of fact he assumed such right and claimed to hold under it. The validity vel non of his claim is immaterial. Its hostility vel non to the heirs is the important and controlling issue. Its quality as being or not in denial of the title of the heirs, and not its quality as being or not rightful and authorized, determines whether the possession by him under it is adverse to them. That such a claim is not hostile to but in recognition of the heir's title, and that possession taken and held under it is not adverse to them, seems altogether clear. We, therefore, deem it unnecessary to determine in this case whether A. E. Ashford had the right as administrator to take and hold possession of the land sued for. That he did take possession in 1866 immediately after he was appointed administrator is proved beyond controversy. That he has been in possession from that time to the trial of this cause continuously and uninterruptedly, there is at least a tendency of the evidence to show. The jury having a right to find in line with this tendency, a further inquiry of importance to be submitted to them was whether he entered upon and took possession of the premises and has continued to hold them as administrator claiming in that capacity—whether he had any such right or not as administrator. If they found that his claim was based only upon his assumed right as administrator and that his possession under that claim ⁶³⁷ has continued throughout the years that have passed, that possession could not be adverse to the heirs of his intestate who prosecute this suit, and they should have found for the plaintiffs. If he at any time repudiated this capacity in which he took possession, and afterward claimed to hold in his individual right, such repudiation would not operate to give an adverse character to his possession unless and until a knowledge of such repudiation was brought home to the heirs—not mere notice, but knowledge. Again, if he took possession as administrator, or at any time held possession in that capacity, and while in possession under that claim of right, he actually passed the possession over to his wife, but continued as before to reside on the land, and there was no visible marks of any change of possession from him to his wife, and no repudiation by him of the original character of his possession brought to the knowledge of the heirs, they would still be entitled to recover against him and against those now claiming under her, however long such

possession of the wife may have continued before suit brought. It was, therefore, competent for the plaintiffs to prove not only against the defendant, A. E. Ashford, but also against the defendants now claiming under his deceased wife, that he took possession as administrator, and that he held possession as such administrator at the alleged inception of the wife's possession. There could scarcely be better evidence that he took possession as administrator, and so held it at the time it is claimed the wife's possession began, than his petition to the probate court for an order to sell the lands for division among the heirs of the intestate and the orders and proceedings had thereon at his instance; and this petition and these orders and proceedings should have been received in evidence not only for the limited purpose for which they were received—to show that he was the administrator—but to show further against all the defendants that the possession was taken and held up to the time his wife is alleged to have been put in possession, as administrator of the estate of plaintiffs' ⁶³⁸ ancestor. The court erred in so limiting the effect of this evidence.

Moreover, the case was tried below on the theory that the defendant's deviser, Mrs. C. T. Ashford, the wife of the defendant, A. E. Ashford, had acquired title to the land in controversy by adverse possession against these plaintiffs. It was shown that whatever possession she originally acquired was taken under Dr. E. C. Ashford. He was an heir of Thomas Ashford, deceased, the ancestor of the plaintiffs, and of A. E. Ashford. As such heir he had title to an undivided one-fourth interest in this land. A. E. Ashford had title to the same interest, and the plaintiffs' immediate ancestors had title severally to the other two one-fourth interests. A. E. Ashford's one-fourth interest was sold under execution, and purchased by Dr. E. C. Ashford—nominally at least. The latter then had two undivided one-fourth interests. He then undertook to convey whatever interest he acquired at execution sale to Mrs. C. T. Ashford, the wife of the defendant in execution. It was then that she entered upon whatever possession she ever acquired from Dr. Ashford and A. E. Ashford, and the other defendants undertake to testify broadly and roundly that Dr. Ashford then put Mrs. C. T. Ashford in possession of the whole property, and that thereafter until her death in 1897 she held the possession of the whole adversely to all the world. We suppose that it was intended by these witnesses to depose that she then took possession of this tract of land in its entirety—all interests in it—and so

held it to her death. But there is, to say the least, abundant evidence in the case to authorize the jury to conclude that even if she did take and hold possession of the whole tract, it was only in her capacity as a tenant in common claiming title only to the one-fourth undivided interest originally owned by A. E. Ashford, sold on execution against him about 1874, purchased by Dr. Ashford and by the latter undertaken to be conveyed to Mrs. C. T. Ashford in 1875. And, indeed, when Mrs. C. T. Ashford more than twenty years after approached her end, she ⁶³⁹ undertook to dispose of her whole estate by last will, and in that instrument expressly devises as her whole estate in this land an undivided interest therein. So that, to put the case most favorably for defendants, it was for the jury to say whether Mrs. C. T. Ashford entered in 1875 as a tenant in common with the plaintiffs, and, if they found that she did so enter, to say further whether her possession as such tenant in common was ever converted into a holding by her adverse to her cotenants, such as would start the running of the statute of limitations or period of prescription against them. Upon this issue a vital inquiry was whether these cotenants ever had any notice of this change in the character of Mrs. Ashford's possession, and in determining this issue of notice vel non it was competent for the plaintiffs to prove in rebuttal of the evidence tending to show such notice that throughout all these years A. E. Ashford, living on the land with his wife, the said C. T. Ashford, gave in the land for taxation and paid the taxes upon it as the land of the estate of Thomas Ashford, deceased, that he did this as administrator, and that even after the death of his wife he held himself out to them as being in possession of the land as the administrator of Thomas Ashford's estate. All this was evidence bearing upon the inquiry whether under all the circumstances surrounding and pertaining to the possession of the land from 1866 to the death of Mrs. Ashford the plaintiffs had any notice that her possession had ceased to be in recognition of their common title, and had become adverse to them. If Mrs. Ashford ever did claim in hostility to them—of which we cannot say less than that there is the gravest doubt—there would be more room for concluding that they had notice of it had not A. E. Ashford been himself all along upon the land claiming possession of it as administrator, paying taxes on it as the land of the estate, and in general assuming, rightfully or wrongfully, to represent their undivided interests in the land. Upon another trial, therefore, the letters of A. E. Ashford to Tom Ashford, the fact that

he all along gave the property in for taxes and paid taxes upon it as the property ⁶⁴⁰ of the estate, and all his other acts and doings going to show that he was or claimed to be in possession of the land as administrator should be received in evidence in rebuttal of the claim made that plaintiffs had notice of Mrs. Ashford's possession in hostility to them.

The court erred in allowing the witness A. E. Ashford to testify that "Fred Ashford knew that Carrie T. Ashford was in possession of the land sued for, claiming it as her own." This was a palpable conclusion of fact. The witness could not have absolutely known the fact he thus assumed to depose to at all. His conclusion that it existed was necessarily arrived at by inference from other facts; and it was for the jury, and not for him, to draw whatever deductions in this regard such other facts warranted.

That part of the court's general charge which was in this language: "If when Mrs. Carrie T. Ashford went into possession under the deed from Dr. E. C. Ashford, if she claimed the whole interest in the land sued for, her claim to the whole lands could ripen into a title of adverse possession," is faulty in assuming that Dr. Ashford executed a deed to Mrs. Ashford. It also has a tendency to mislead the jury to the conclusion that the possession of one tenant in common may be adverse to the title of another without an actual ouster of the other and without a knowledge of an adverse claim of ownership on the part of the tenant in common in possession being brought home to the tenant out of possession. The law is well settled that the possession of one tenant in common is *prima facie* presumed to be the possession of all, and that it does not become adverse to the cotenants unless they are actually ousted, or, short of this, unless the adverse character of the possession of one is actually known to the others, or the possession of the one is so open and notorious in its hostility and exclusiveness as to put the other tenants on notice of its adverse character.

The following are the assignments of error having reference to the action of the court on request for instructions: "The court erred in refusing to give the charges ⁶⁴¹ requested by plaintiff numbered from 1 to 19." "The court erred in giving charges numbered from 20 to 45." These assignments are too general to bring under review the several charges bearing the stated numbers found in the transcript. The appellants could take nothing by these assignments severally unless each of charges 1 to 19 should have been given, and each of those from

20 to 45 should have been refused, which is not the case. We will, therefore, not consider the special charges given and refused.

Reversed and remanded.

Adverse Possession must be hostile, under a claim of right, and not in recognition of the title of the true owner: *Alsup v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795; *Alabama Lumber Co. v. Keel*, 125 Ala. 603, 82 Am. St. Rep. 265, 28 South. 204; *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540, 57 S. W. 719; *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175; *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613, 56 N. W. 73; note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162. But see *Carney v. Hennessey*, 74 Conn. 107, 92 Am. St. Rep. 199, 49 Atl. 910.

The Possession of a Tenant in Common is prima facie not adverse to his cotenants: *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757, and cases cited in the cross-reference note thereto; *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157, 39 Atl. 898; *Scotch Lumber Co. v. Savage*, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607. The entry of one cotenant is ordinarily the entry of all: *Hudson v. Coe*, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249. But he may so enter and hold as to render his possession adverse and an ouster of the others: *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774; *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844; *Beall v. McMenemy*, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134.

TEASLEY v. STANTON.

[136 Ala. 641, 33 South. 823.]

DEEDS—Right of Way.—A deed containing a boundary on "an intended street" grants an appurtenant private right of way thereon. (p. 89.)

VENDOR AND PURCHASER—Streets—Estoppel to Deny.—If a grantor conveys land bounding it on a way or street, he and his heirs are estopped to deny that there is such a way or street. Such description is an implied covenant on the part of the grantor of the existence of such way or street and of the right of the grantee to its use. (p. 89.)

Marks & Sayre, for Teasley, appellant.

C. P. Jones, for Stanton, cross-appellant.

647 HARALSON, J. On the trial of this case in the court below, it was adjudged and decreed, that as to the defendants, Burch, the case be dismissed as prayed by them in their answer. It was further adjudged and decreed that the defendant, Isaac S. Stanton, had no right, title or interest in or to a right of way over the property described in complainant's bill.

The opinion of the learned chancellor found in the record is as follows: "The question raised by the claim of Stanton is different from that raised by the claim of Burch. They are both claiming a private way over the same property and by virtue of deeds of the same import from the same original source of title. But there is a difference nevertheless.

"The defendant Stanton claims a right of way under the deed of May 21, 1867, and not otherwise. This deed describes the lot as fronting on the 'reserve.' But the more particular description by courses and distances, when read in connection with the agreed statement of facts, shows that the lot conveyed is distant one hundred and five feet from the reserve and cannot front upon it. This description of the lot as fronting on the reserve is false. Being palpably false, I think no implied covenant can arise out of it.

"But there is no such difficulty in the claim of Burch. In the deed from Wilson to Burch the lot conveyed is described as fronting on 'the continuation of a strip of ground sixty feet by three hundred and thirty feet intended and reserved for the continuation of South street.' A boundary on 'an intended street' grants an appurtenant private right of way: *O'Linda v. Lathrop*, 21 Pick. 292, 32 Am. Dec. 261; *Smith v. Lock*, 18 Mich. 56; *Jones on Easements*, secs. 227, 228.

648 " 'When a grantor conveys land, bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way. This is not descriptive merely, but an implied covenant of the existence of the way,' and 'the description of the way, in the deed, as a contemplated passageway, shows the agreement of the parties that there should be such a passageway, as distinctly as if it had been already laid out, and has the like effect': *Tufts v. City of Charlestown*, 2 Gray, 272; *Stetson v. Dow*, 16 Gray, 372; *Franklin Ins. Co. v. Cousens*, 127 Mass. 258; *Burrell v. Burrell*, 11 Mass. 296.

"As I understand *Steele v. Sullivan*, 70 Ala. 589, *Hoole v. Attorney General*, 22 Ala. 197, and the other cases cited by complainant, they only assert that the description of land as bounded by a road is not, alone, evidence of a dedication to the public.

"I think Burch has a private way over the property in question, but that Stanton, in the present condition of his deed, has none."

The case has been here carefully examined on the pleadings and proofs, and argument of counsel, and we approve the finding

and decree of the lower court. This opinion of the court seems to us to be a correct exposition of the law of the case, and we approve and adopt the same.

Affirmed.

For Authorities bearing on the principal case, see Prescott v. Edwards, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 178; Ralston v. Weston, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326; Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

MERGUIRE v. O'DONNELL.

[139 Cal. 6, 72 Pac. 337.]

JUDGMENTS—Satisfaction of—Vacating Because of Irregularity in the Proceedings Concerning the Sale.—If an execution is void because not signed by the clerk in office at the time of its issuing, and the judgment is satisfied by a sale thereunder, void because of such irregularity, the satisfaction thus produced may be set aside and the judgment revived on motion, under a statute declaring that if the purchaser of property or his successor in interest fails to recover possession in consequence of irregularity in the proceedings concerning the sale, the court may revive the judgment for the amount paid by the purchaser at the sale with interest. (p. 93.)

JUDGMENT—Satisfaction of—Construction of Statute Authorizing Proceedings to Set Aside and to Revive the Judgment.—A statute providing that when the purchaser at an execution sale fails to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property was not subject to execution, the court may set aside the satisfaction and revive the judgment for the amount paid by the purchaser, is remedial in its character, and should be liberally construed. (p. 93.)

JUDGMENT—Satisfaction of—Statute of Limitations Against Proceeding to Vacate.—Under a statute authorizing proceedings to revive a judgment and to set aside its apparent satisfaction if the purchaser fails to recover possession in consequence of irregularity in the proceedings concerning the sale, the statute of limitations does not begin to run against the remedy thereby given until the purchaser fails to recover possession or until the action to recover the property is finally determined against him. This remedy is not an action upon a judgment, and hence is not controlled by the statute of limitations applicable to such actions. (pp. 93, 94.)

Appeal from an order denying a motion to revive a judgment.

J. S. Reid, for the appellant.

Clinton G. Dodge and Reed & Nusbaumer, for the respondent.

7 GRAY, C. In this case the plaintiff obtained a judgment against the defendant for six hundred and fifty dollars, besides costs. An execution, or what purported to be an execution rather, was issued, and certain real property of defendant was, under said execution and an order of the court, sold to satisfy said judgment. The appellant was the purchaser at said sale, and is also the assignee of the judgment. Subsequent to this sale the judgment was satisfied. Thereafter the defendant herein commenced a suit to quiet title to the real estate so sold, and in said suit it was finally determined that the execution under which said sale was held was void because it was not signed by the county clerk in the office at the time of its issuance, but had printed at the conclusion of it the name of his predecessor, followed with "by" and the name of a then deputy clerk: O'Donnell v. Merguire, 131 Cal. 527, 82 Am. St. Rep. 389, 63 Pac. 847. O'Donnell's title was quieted in said action, and a few days after the going down of the remittitur therein from this court Reid, the said purchaser at the execution sale, moved the court under the provisions of section 708 of the Code of Civil Procedure, to set aside the satisfaction and revive the original judgment in his name for the amount paid by him at said sale, with interest. The appeal is by Reid from the order denying his said motion, and we think the order should be reversed.

Section 708 of the Code of Civil Procedure, so far as applicable, reads as follows: "If the purchaser of property at sheriff's sale, or his successor in interest fail to recover possession ^s in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more." Respondent's position is, that the case is not within the quoted section, for two reasons: 1. The execution being absolutely void, as held in the suit to quiet title, does not constitute an "irregularity in the proceedings concerning the sale"; and 2. The judgment having been entered and become final more than five years before the motion was made, it

was barred by the statute of limitations, and should not be revived.

1. We think a sale made by a sheriff on an order of the court and a void execution is "irregular" in the extreme degree, and that a sale had on a void execution is void for the reason of "irregularity in the proceedings concerning the sale." Section 708 of the Code of Civil Procedure, being remedial in its character, should be liberally construed: *Hitchcock v. Caruthers*, 100 Cal. 102, 34 Pac. 627; *Cross v. Zane*, 47 Cal. 602. The section under consideration was intended to give a remedy by petition in the action which had culminated in the judgment sought to be revived. There was and is a remedy by an independent suit in equity by which similar relief may be had as is given by the statute: *Scherr v. Himmelman*, 53 Cal. 312; and this remedy as administered in equity extends to cases where the execution and sale under it are both held to be void: *Smith v. Reed*, 52 Cal. 345; and, giving the section the liberal construction required, it is clear that the remedy intended to be given under it is as broad as that to be obtained in the corresponding action in equity. It is certainly necessary and consonant with the principles of equity that a party should have relief in cases where the execution and sale are void, as well as in those cases where there is an irregularity of such a character as to render the sale merely voidable. Indeed, it would seem that the requirements of equity were the same in both the supposed cases, and there is no good reason for applying the section to one of them and not to the other.

2. Nor do we think that the statute of limitations had run against the remedy given by the quoted section. The right to the remedy does not arise until the purchaser shall "fail to recover possession." The facts disclosed show that the motion was made only sixteen days after the remittitur was issued in the suit to quiet title. That suit was commenced within twenty days after the execution sale and about one year after the judgment, the revival of which is here sought, had become final, by reason of the affirmance thereof on appeal to the supreme court. During the pendency of the suit to quiet title Reid was endeavoring to obtain a judgment in his behalf which would result in his obtaining possession of the property which he had bought at the execution sale. It cannot be said that he had failed to obtain possession until that suit was finally determined against him. As his remedy under the statute did not arise until such failure, the statute of limita-

tions could not begin to run prior to that time. It is a well-settled principle that the statute of limitations does not begin to run until the cause of action is matured so that a suit can be based upon it. The remedy here sought is not "an action upon a judgment" within the provisions of section 336 of the Code of Civil Procedure, which limits the right of action on a judgment to five years, and that section does not affect this case. There is nothing to indicate that the legislature intended to control the effect or operation of section 708 of the Code of Civil Procedure, or the remedy under it, by said section 336. We think that the only statute of limitations applicable to said remedy is section 343 of the Code of Civil Procedure, which provides that "An action for relief not heretofore provided for must be commenced within four years after the cause of action shall have accrued," and, as we have already seen, the remedy or "cause of action" here relied upon did not accrue until a few days before the petition was filed.

We advise that the order appealed from be reversed, with directions to the court below to enter an order in accordance with this opinion.

Haynes, C., and Smith, C., concurred.

¹⁰ For the reasons given in the foregoing opinion the order appealed from is reversed, with directions to the court below to enter an order in accordance with this opinion.

Angellotti, J., Shaw, J., Van Dyke, J.

Hearing in Bank denied.

That the Satisfaction of a Judgment which results in no benefit to the plaintiff may be set aside, see the note to *Jones v. Burr*, 53 Am. Dec. 701-705; *De Loach etc. Co. v. Little Rock etc. Co.*, 65 Ark. 467, 67 Am. St. Rep. 942, 47 S. W. 118; *Touhey v. Touhey*, 151 Ind. 460, 68 Am. St. Rep. 233, 51 N. E. 919.

DOBBINS v. CITY OF LOS ANGELES.

[139 Cal. 179, 72 Pac. 970.]

CONSTITUTIONAL LAW.—The Fourteenth Amendment of the Constitution of the United States is not violated by a municipal ordinance restricting the right to erect and maintain gasworks in a city to the territory named in the ordinance. (p. 96.)

CONSTITUTIONAL LAW—Police Power—What Municipal Ordinances are Within.—An ordinance obviously foreign to any recognized purpose of the police power and interfering with the ordinary enjoyment of property would, no doubt, be held invalid, but where an ordinance is reasonably within a proper consideration of and care for the public health, safety or comfort, the court will not disturb the legislative act, nor substitute its own views of what is proper in the premises for those of the legislative body. (p. 97.)

MUNICIPAL CORPORATIONS—Police Power.—An Ordinance Limiting the Right to Erect and Maintain Gasworks to the territory named in the ordinance is a legitimate exercise of the police power. (p. 97.)

MUNICIPAL CORPORATIONS.—The Motives Which Induced the Enactment of a Municipal Ordinance cannot be considered in a judicial proceeding questioning its validity. (p. 98.)

MUNICIPAL ORDINANCES—Application of to Buildings Already Erected.—An ordinance forbidding the manufacture and sale of gas within specified limits applies to gasworks in the process of construction when it was enacted. (p. 98.)

MUNICIPAL CORPORATIONS—Police Regulation—Estoppel to Enforce.—A permit issued by a municipal corporation authorizing the erection of gasworks on a designated lot cannot estop the municipality from subsequently enacting and enforcing an ordinance forbidding the erection and maintenance of such works within a designated part of the city in which is included the same lot. (p. 99.)

Lynn Helm and Lee, Scott, Bailey & Chase, for the appellant.

W. B. Mathews, city attorney, and Davis & Rush, for the respondent.

¹⁸¹ McFARLAND, J. This action was brought to obtain an injunction restraining the defendant, the city of Los Angeles, a municipal corporation, from enforcing certain ordinances of the city prohibiting the erection or maintenance of gasworks within certain parts of said city. A demurrer to the complaint was sustained in the court below and judgment rendered for defendant. From the judgment plaintiff appeals.

On the twenty-sixth day of August, 1901, the city adopted ¹⁸² an ordinance, No. 6,663, by which it was provided that "it shall be unlawful for any person, firm, or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment, or manufactory for the manufacture of

gas, or any tank, reservoir, or other receptacle, for the storage of gas, within the corporate limits of the city of Los Angeles, outside of the limits of the district described as follows, to wit." (And then follows a description of the district.) It was also provided that any person who should violate the above provision should be guilty of a misdemeanor, and upon conviction be punished by fine or imprisonment, or both. On the third day of March, 1902, the city adopted another ordinance, No. 7029, amendatory of the said ordinance No. 6663. This second ordinance merely amends the first by changing the boundaries of the area within which the erection and maintenance of gasworks were prohibited. These two ordinances are the only ones necessary to be considered. The plaintiff was engaged in erecting gasworks within the territory in which the erection of such works was prohibited by the second ordinance; and it is averred that, by procurement of the defendant, certain employés of the plaintiff, engaged in labor upon her said gasworks, have been arrested and prosecuted for a violation of said ordinance, and that defendant threatens to continue to arrest and prosecute her employés for such violation. The prayer of the complaint is, that defendant be enjoined and restrained from enforcing said ordinance and from "prosecuting or proceeding with any prosecution commenced or to be commenced" under said ordinances against plaintiff or any of her agents or employés. There are other averments in the complaint which will be noticed hereafter.

The general contention of appellant that the ordinances in question are invalid and void because violative of the fourteenth amendment to the federal constitution, and of other constitutional guaranties, state and federal, of the enjoyment of property, or vested rights, the equal protection of the law, etc., is not maintainable. The ordinances were passed in the exercise of the police power which is fully granted to the city of Los Angeles by statutory law, by its charter, and by the constitution of the state. Its charter gives it power to suppress¹⁸³ or prohibit all offensive places of business, and to regulate or prohibit explosives, combustibles, or inflammable material within the city or any specified part thereof. By the act of the state legislature of April 4, 1870, entitled "An act concerning gasworks" (Stats. 1869-70, p. 815), it is provided that cities "may also control the location and construction of works so that they may be erected on suitable localities to give

the least discomfort or annoyance to the public." This act was expressly continued in force by subdivision 20 of section 19 of the Political Code. And by the state constitution itself (art. 11, sec. 11) it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, or other regulations as are not in conflict with general laws." There is no doubt, therefore, that the exercise of this police power belongs to the respondent within its territorial limits; and the only question is whether the adoption of the ordinances in question was a legitimate exercise of it, for all property is held subject to that power. An ordinance obviously and undoubtedly foreign to any of the recognized purposes of the police power, and interfering with the ordinary enjoyment of property, would, no doubt, be held by a court to be invalid. But where the ordinance is reasonably within a proper consideration of and care for the public health, safety, or comfort, a court will not disturb the legislative act; it will not substitute its own views of what is proper in the premises for those of the legislative body. In *Munn v. Illinois*, 94 U. S. 113, the United States court states the rule thus: "If no state of circumstances could exist to justify a certain statute, then we may declare this one void because in excess of the legislative power of this state; but if it could, we must presume it did. Of the propriety of legislative interference, within the scope of the legislative power, the legislature is the exclusive judge." This rule is very fully discussed and declared in *Power v. Commonwealth of Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, the "oleomargarine" case: See, also, *Crowley v. Christensen*, 137 U. S. 87, 11 Sup. Ct. Rep. 13, and *Canfield v. United States*, 167 U. S. 518, 17 Sup. Ct. Rep. 864. And it cannot be said judicially that volatile, inflammable, explosive, and bad smelling gas is not within the category of things which interfere with the public safety, welfare, and comfort, and therefore beyond ¹⁸⁴ the reach of the police power. The exercise of this power is not confined to the regulation of only such interferences with the public welfare and comfort as come strictly within the common-law definition of a "nuisance": Ex parte Lacey, 108 Cal. 326, 49 Am. St. Rep. 93, 41 Pac. 411; Ex parte Shrader, 33 Cal. 283.

It is averred in the complaint that the said ordinances were adopted, not for the purpose of protecting public interests, but for the purpose of protecting and favoring a certain named company engaged in the manufacture and sale of gas in said

city. But the motives which induce a legislative body to make a law cannot be considered in a judicial proceeding in which the validity of the law in question is involved. In Cooley's Constitutional Limitations, sixth edition, page 231, it is said: "Although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the governor in the exercise of the discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people"—and numerous authorities are referred to which sustain the text: See, also, *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730.

It is also averred that prior to the adoption of the second ordinance plaintiff had made certain contracts with third parties to furnish materials for and do labor on gasworks which she was about to erect, and had purchased land to be used as a site for such works within the territory where the erection of such works, under the first ordinance, was permitted, and had expended a considerable amount of money in building the foundation of her contemplated works and in partly erecting the same; and that by the second ordinance the boundaries of the excepted district were so changed as to put her said land outside of the territory where gasworks were permitted. And it is further alleged that prior to the adoption of the second ordinance she had commenced to erect her works under a permit of the board of fire commissioners of ¹⁸⁵ said city, in pursuance of the fire and building ordinances. And she contends that, even if the general principle relied on is not maintainable, these additional facts make the second ordinance invalid as an unwarranted interference with the enjoyment of property, an impairment of the obligations of contracts, etc. But this contention cannot be maintained. The ordinance provides that "it shall be unlawful for any person to erect or maintain" gasworks outside of the described district. This language clearly includes works in course of construction as well as those to be begun in the future; and under the authorities the exercise of the police power clearly covers prohibited buildings partly erected, although great hardship to the builder may follow. It is somewhat difficult to see exactly what is the character and signifi-

cance of the alleged permit from the fire commissioners. Appellant contends that it was an express contract with the city to allow her to erect and maintain her gasworks. We do not think that this conclusion results from the averments of the complaint. At all events, there was nothing in this permit which took away from the city the police power which it afterward exercised. The city could not thus estop itself from making and enforcing proper police regulations. In *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, the legislature of the state had granted to plaintiff the privilege of manufacturing fertilizers in the village of Hyde Park and conveying the products through its streets, and plaintiff had expended two hundred thousand dollars in constructing its plant; but it was held that, notwithstanding these facts, the village, by virtue of its police power, could prohibit the business and compel the plaintiff to abandon its works. In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 672, 6 Sup. Ct. Rep. 252, the court say: "Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations. Whatever, therefore, in the manufacture of or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff be prohibited by legislation or by municipal ordinance ¹⁸⁶ passed under legislative authority": See, also, *Barbour v. Connelly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 750, 4 Sup. Ct. Rep. 652; *Ex parte Lacey*, 108 Cal. 326, 49 Am. St. Rep. 93, 41 Pac. 411.

Our conclusion is, that the ordinance here involved are valid, and that therefore the judgment should be affirmed. This view makes it unnecessary to consider the question elaborately discussed by counsel—to wit, whether or not a court of equity will ever enjoin a criminal prosecution.

The judgment appealed from is affirmed.

Shaw, J., Angellotti, J., Lorigan, J., and Henshaw, J., concurred.

Rehearing denied.

Beatty, C. J., Lorigan, J., and Henshaw, J., dissented from the order denying a rehearing, and Van Dyke, J., took no action thereon.

In the Exercise of its Police Power a city may regulate the location of offensive and dangerous trades and businesses, provided the regulations are reasonable: *Ex parte Lacey*, 108 Cal. 326, 49 Am. St. Rep. 93, 41 Pac. 411; *St. Louis v. Howard*, 119 Mo. 41, 41 Am. St. Rep. 630, 24 S. W. 770; *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, 44 N. E. 853; *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; *Huesing v. Rock Island*, 128 Ill. 465, 15 Am. St. Rep. 129, 21 N. E. 558. But it is held that a city has no general or implied authority to suppress or confine a lawful business to a designated locality when it is not a nuisance per se: *Crowley v. West*, 52 La. Ann. 527, 78 Am. St. Rep. 355, 27 South. 53. An ordinance excluding from a city a slaughter-house already in existence is a legitimate exercise of the police power: *Portland v. Meyer*, 32 Or. 368, 67 Am. St. Rep. 538, 25 Pac. 21.

HIBERNIA SAVINGS AND LOAN SOCIETY v. SAN FRANCISCO.

[139 Cal. 205, 72 Pac. 920.]

TAXATION—Property Subject to.—Checks or Orders on the Treasury of the United States are subject to taxation as the solvent credits of the payee or holder. They are not exempt under the provisions of the Revised Statutes of the United States, providing that all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under any state, or municipal, or local authority. (pp. 104, 105.)

Tobin & Tobin, for the appellant.

Franklin K. Lane, city attorney, and W. I. Brobeck, for the respondent.

205 *ANGELOTTI, J.* This action was brought by the plaintiff to recover certain taxes for the fiscal year 1899-1900, paid by it under protest. Defendant demurred to the complaint, and the demurrer to the count in which it was sought to recover nineteen hundred and eighty-six dollars and fifty-five cents taxes, paid by plaintiff under protest upon two checks or orders of the treasurer of the United States, was **206** sustained. Judgment was thereupon entered for defendant, so far as said count was concerned, and plaintiff appeals therefrom. The only question presented by the appeal is as to whether or not these checks or orders were taxable by the state or municipality.

The orders, as is shown by the complaint, were included in the assessment against plaintiff as "solvent credits." They were drawn January 1, 1899, by the treasurer of the United States in favor of plaintiff, addressed to "The Treasurer or an Assistant Treasurer of the United States," and directing the payment to plaintiff of the amount named therein and the charging of the amount to "Treasurer U. S. in General Account." Upon each of the orders was an indorsement to the effect that the same, properly countersigned and indorsed, is payable any time within four months from its date at the treasury or any subtreasury in the United States, and that after that period it is payable only at the United States treasury at Washington. One of the orders was for \$120,000, in payment of quarter-yearly interest, due January 1, 1899, on United States four per cent consols of 1907, and the other was for \$1,875, in payment of quarter-yearly interest, due January 1, 1899, on United States three per cent consols of 1908. These orders were, so far as the complaint shows, delivered to and accepted by plaintiff immediately upon being drawn, and were retained by it until after the first Monday of March, 1899, and, being in the possession of and owned by plaintiff on said last-named date, were assessed by the assessor as "solvent credits" belonging to plaintiff.

Plaintiff's claim is, that the same were exempt from taxation by state or municipal authority, under the provisions of section 3701 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 2480), which provides that: "All stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority," the theory of plaintiff being, that these orders were "obligations" of the United States within the meaning of that word as used in that section.

It is manifest that these orders are not within the reason and scope of the rule forbidding such taxation by the states as may tend to destroy the powers of the national government ²⁰⁷ or impair their efficiency, a rule which exists independently of any statute of the United States, and which cannot be impaired by any state constitutional provision.

It is because, as declared by the United States supreme court in *McCulloch v. Maryland*, 4 Wheat. 316, "states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested

Sidney B. Dockweiler

in the general government," that government bonds and other promises of the government are beyond the taxing power of the states. The authority to borrow money on the credit of the United States is not only absolutely essential to the existence of the government, but is in the enumeration of powers expressly granted by the constitution (see *Banks v. Mayor*, 7 Wall. 16), and taxation by the states of the means employed by the government in the exercise of that power would tend to impair its efficiency. As was said by Chief Justice Marshall, in *McCulloch v. Maryland*, 5 Wheat. 316: "The right to tax the contract to any extent, when made, must operate on the power to borrow before it is exercised and have a sensible influence on the contract. . . . To any extent, however inconsiderable, it is a burden upon the operations of the government. It may be carried to an extent which shall arrest them entirely." Solely for this reason, a promise of the government, "securing the payment stipulated to the holder by the pledge of the national faith," in whatever form it might be, was always held to be exempt from taxation by the states. The only ground upon which it was held that United States notes and bills intended to circulate as money were exempt from taxation was, that the courts could not say that their usefulness and value as means to the exercise of the functions of government would not be injuriously affected by state taxation, and that it was therefore within the discretion of Congress to determine whether their usefulness as a means of carrying on the government would be enhanced by exemption from taxation: *Banks v. Supervisors*, 7 Wall. 26.

While the courts of the United States have been steadfast and vigilant in upholding a principle so essential to the existence of the national government, they have been as vigilant in confining the operation of that principle to those cases ²⁰⁸ where its application was necessary for the protection of some power of the government. In *National Bank v. Commonwealth*, 9 Wall. 353, a case involving the question of taxability of shares of stock of national banks, the supreme court said: "The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle is founded. That limitation is, that the agencies of the federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded

alone in the necessity of securing to the general government of the United States the means of exercising its legitimate powers into unauthorized and unjustifiable invasion of the rights of the state."

Although public lands of the United States are exempt from state taxation, it is well settled that where all the conditions for a patent from the government have been complied with, and nothing remains to be done but the issuance of the patent conveying the legal title, which can be obtained at any time by the donee or purchaser, he is to be treated as the beneficial owner of the land, and it is subject to taxation. In *Wisconsin Cent. R. R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. Rep. 341, the supreme court of the United States, in discussing this matter, said, through Mr. Justice Field: "This exception to the general doctrine is founded upon the principle that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation": See, also, *Northern Pac. R. R. Co. v. Patterson*, 154 U. S. 130, 14 Sup. Ct. Rep. 977; *Cooley on Taxation*, 88; *Mitchell v. Board of Commissioners*, 91 U. S. 206; *Shotwell v. Moore*, 129 U. S. 590, 596, 9 Sup. Ct. Rep. 362.

It is impossible to conceive of any reason why the taxation by the state of the orders in question would injuriously affect the power of the government to borrow money, or any other function of the government. They were not issued as a means of executing any constitutional power of the government. The transaction as to the quarter-yearly interest, for the payment of which they had been given by the government and received by the plaintiff, had been closed. The obligation of the government ²⁹⁹ in regard thereto had been fully satisfied. The orders were simply a convenient mode of payment of the obligation. They were, for all practical purposes, the money itself. The only possible object to be attained by their exemption would be to enable the holder to avoid its just share of state taxation. They are clearly within the reason for the exception to the general rule stated in *Wisconsin Cent. R. R. Co. v. Price Co.*, 133 U. S. 496, 9 Sup. Ct. Rep. 362, and hereinbefore set forth—for plaintiff had the right to the immediate possession of the money evidenced thereby, and was not excluded from such possession, except so far as it might be excluded by a desire to escape taxation. The case of *Banks v. Mayor*, 7 Wall. 16, relied on by plaintiff, is not in point. The certificates there involved were

certificates of indebtedness, issued by the government, payable in one year or earlier at the option of the government, and bearing interest, and were issued at a time when full money payment was impossible, and the government was using its credit to obtain further time. They were promises of the government, to the observance of which the national faith was pledged, indistinguishable from the bonds of the government issued for borrowed money, and there is not the slightest analogy between them and the orders here involved. It may well be doubted whether it is within the constitutional power of Congress to provide for the exemption from state taxation of orders similar to those here involved. However that may be, we are satisfied that Congress has not attempted to provide for such exemption. The statute relied on (Rev. Stats., sec. 3701; U. S. Comp. Stats. 1901, p. 2480) was enacted simply in furtherance of the principle enunciated in *McCulloch v. Maryland*, 4 Wheat. 316, and to indicate the determination of Congress that the usefulness of certain instruments as a means of carrying on the government would be enhanced by exemption from taxation: See *Banks v. Supervisors*, 7 Wall. 26. The words "and other obligations," read in connection with the context, "stocks, bonds, treasury notes," include only obligations of the government similar in character to those specifically named, and given under the general power to borrow money on the credit of the United States and to issue in return therefor obligations in any appropriate form (see *Legal Tender* ²¹⁰ Case, 110 U. S. 421, 444, 4 Sup. Ct. Rep. 122), and do not include checks given in payment of such obligations.

Learned counsel for plaintiff have not cited a single case in which it was held that the mere check of the government, payable on demand, is exempt from taxation, and we have not been able to find any case in which any such claim has been made. While the act of Congress of 1894 (2 Rev. Stats. Supp., p. 236; U. S. Comp. Stats. 1901, p. 2398), to subject to state-taxation national bank notes and United States notes and certificates payable on demand, and intended to circulate as money, does not include orders like those here involved, it shows the determination of Congress that the exemption of promises of the United States of the kinds therein named was no longer necessary for the protection of any governmental power. It cannot be doubted that had Congress deemed that any question could arise as to the taxability of checks of the government payable on demand, it would have included them in the act,

modifying section 3701. But, as we have seen, such checks were never included in the provisions of said section, and were never exempt from taxation.

Not being exempt under the laws of the United States, they are not exempt under the provisions of our constitution: Const., art. 13, sec. 1.

The judgment is affirmed.

Shaw, J., and Van Dyke, J., concurred.

Taxation.—The legislature possesses unlimited powers of taxation, except as restrained by the organic law: *Matter of Pell*, 171 N. Y. 48, 89 Am. St. Rep. 791, 63 N. E. 789. But it cannot tax the means and instrumentalities of the federal government: See the monographic note to *People v. National Bank*, 69 Am. St. Rep. 39. On state taxation of national banks, and their stock and property, see the monographic notes to *Commonwealth v. First Nat. Bank*, 96 Am. Dec. 290-297; *People v. National Bank*, 69 Am. St. Rep. 38-52.

O'BRIEN v. LEACH.

[139 Cal. 220, 72 Pac. 1004.]

JUDGMENT—Relief from, Because of the Neglect of an Attorney.—A statute authorizing the court to relieve from a judgment taken against a party through his mistake, inadvertence, surprise or excusable neglect authorizes the granting of such relief when the mistake, inadvertence, surprise or neglect was that of the party's attorney. (p. 106.)

JUDGMENT—Relief from, Discretion of the Court.—The supreme court will rarely interfere with the action of the lower court in granting relief from a judgment taken through the mistake, inadvertence, surprise or excusable neglect of the party or his attorney. The appellate court looks with favor on the action of the lower court in setting aside the judgment, and gives to it a favorable construction of the evidence. (p. 107.)

JUDGMENT—Relief from, Because of an Inadvertence or Mistake.—Where defendant resides in a county other than that in which the action was commenced, and his attorney, acting under a mistaken impression that the client was served with process in the county of his residence, fails to answer within the time specified where the party is served in the county in which suit is brought, and judgment by default is taken, the action of the trial court in relieving from such judgment on motion will be sustained. (p. 107.)

Robert P. Troy, for the appellant.

Denson & Schlesinger and Marshall B. Woodworth, for the respondent.

²²¹ SHAW, J. This is an appeal from an order of the superior court of the city and county of San Francisco setting aside the default of the defendant and vacating the judgment thereupon entered against him. The complaint stated a cause of action for malicious prosecution whereby the plaintiff was imprisoned in the city prison of San Francisco for a short period until he gave bail. The damages claimed amount to twenty-five thousand dollars. The summons was served on June 8, 1900, in the city of San Francisco. The default was entered on June 19th, and on June 20th the cause was heard by the court, documentary evidence was introduced for the plaintiff, and judgment given in favor of the plaintiff for twenty-five thousand dollars, as prayed for in the complaint, with costs. A motion to set aside the default and judgment was made by the defendant the following day, but, owing to imperfections in the notice and affidavits filed in support of it, the motion was denied, without prejudice. On June 25th another notice of motion was served and filed, and it was upon this motion that the order appealed from was made.

The notice^{*} states that the judgment was taken because of the mistake, inadvertence, and excusable neglect of the defendant's attorney. The plaintiff contends that the statute does not authorize the court to set aside a default unless the ²²² mistake, inadvertence, or excusable neglect was that of the defendant himself. There is nothing in this point that requires discussion. That which a person does through his agent is in law, for many purposes, deemed to have been done by himself, and where a party commits his defense to the agency of an attorney, the excusable neglect or inadvertence of the attorney whereby judgment is taken against the party is as much available to authorize the court to set aside the judgment as though the neglect or inadvertence had been that of the party himself.

It is also objected that the notice of motion does not state the facts upon which the relief is asked. This is not necessary. The notice states the grounds upon which the motion will be made, and it is not necessary that it should state the facts in detail. The real point of this contention seems to be, that the notice states that the grounds upon which the motion will be made are, that the judgment was taken through the mistake and inadvertence of the attorneys, whereas it should have stated that it was done through the mistake and inadvertence of the plaintiff himself. The point is disposed of in the last paragraph.

It is urged that the court abused its discretion in granting the motion to set aside the judgment. In matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion. This court will usually sustain the action of the court below upon the same facts, whether that decision is for or against the motion; but it is much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made. This will explain what would otherwise seem to be a conflict in the decisions.

There is nothing in this case which requires or deserves extended discussion. The court below in deciding the motion should have considered, and undoubtedly did consider, all the facts in the case as shown by the record, including the cause of action set forth in the complaint, the proceedings in applying for judgment, and the amount of the judgment ²²³ rendered in favor of the plaintiff, as well as the affidavits filed.

We are disposed to look with favor on the action of the lower court in setting aside the judgment, and to give to the defendant the most favorable possible construction of the evidence. The substance of the affidavits is, that there was a mistake caused by the fact that the defendant resided in Alameda county, which fact was known to his attorneys, whereas the service upon him was made in the city and county of San Francisco, and the place of service was not stated to the attorney to whose charge the defense was given. From the circumstances under which he received the papers, the attorney naturally supposed that the service was made at the place of residence of the defendant, and, therefore, that thirty days would be allowed in which to appear. It was an inadvertence which might occur, even to a reasonably careful man. It was discovered on the day on which the default was taken, and measures to obtain an extension of time, and to vacate the default, were promptly taken and diligently prosecuted. The court below imposed costs upon the defendant.

Upon a consideration of the whole case, we cannot say the default was not taken through the inadvertence and excusable neglect of the attorney in assuming that he had thirty days within which to appear, and hence we cannot declare that

there was an abuse by the court below of the discretion vested in it.

The order is affirmed.

Van Dyke, J., and Angellotti, J., concurred.

VACATING JUDGMENTS ON ACCOUNT OF THE NEGLIGENCE OR MISTAKE OF AN ATTORNEY.

- I. The General Rule.
- II. The Rule Where the Negligence or Mistake is Such as Would Warrant Relief had It Been the Negligence or Mistake of the Party.
- III. Mistake of Law.

I. The General Rule.

Under the statutes entitling a party to relief from a judgment taken against him through his mistake, inadvertence, or excusable neglect, or through any other cause specified therein, doubt and confusion have arisen respecting the rule applicable when the ground upon which relief is sought is not due to the party personally, but to his attorney employed to manage the case. This doubt or confusion has arisen partly through irreconcilable conflict between authorities, but chiefly from the use of language from which it is easy to draw opposite conclusions. Thus, the opinions of the courts, in most of the states affirm that the neglect or mistake of an attorney or agent must be treated as the neglect or mistake of his principal: *People v. Rains*, 23 Cal. 127; *Ekel v. Swift*, 47 Cal. 620; *Smith v. Tunstead*, 56 Cal. 175; *McDaniel v. McLendon*, 85 Ga. 614, 11 S. E. 869; *Phillips v. Collier*, 87 Ga. 66, 13 S. E. 260; *Spaulding v. Thompson*, 12 Ind. 477, 74 Am. Dec. 221; *Moore v. Horner*, 146 Ind. 287, 45 N. E. 341; *Metropolitan L. I. Co. v. Bergen*, 64 Ill. App. 685; *Clark v. Ewing*, 93 Ill. 572; *Schultz v. Meiselbar*, 144 Ill. 26, 32 N. E. 550; *Jones v. Leach*, 46 Iowa, 186; *Jackson v. Gould*, 96 Iowa, 488, 65 N. W. 406; *Church v. Lacy*, 102 Iowa, 235, 71 N. W. 328; *Mouser v. Harmon*, 96 Ky. 591, 29 S. W. 448; *McFarland v. White*, 13 La. Ann. 394; *Kirby v. Chadwell*, 10 Mo. 392; *Austin v. Nelson*, 11 Mo. 192; *Gehrke v. Jod*, 59 Mo. 522; *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *Harper v. Mallory*, 4 Nev. 447; *Butler v. Morse*, 66 N. H. 429, 23 Atl. 90; *Tarrant Co. v. Lively*, 25 Tex. Supp. 399; *Babcock v. Brown*, 25 Vt. 550, 60 Am. Dec. 290. Some of these cases speak in such general and unqualified terms of the mistake or negligence of an attorney not being a ground entitling the client to relief as to justify the conclusion that in every case no relief can be had, except where the mistake, neglect, etc., was that of the client himself. This, however, is not the rule intended to be affirmed by a majority of the decisions, and we doubt whether it is the rule intended to be affirmed by any one of them. The true rule is doubtless to be found by applying the principle stated in the principal

case, that "that which a person does through his agents is, in law, for many purposes, deemed to have been done by himself," and hence whenever the mistake, negligence or inadvertence relied upon is of so gross a character that it would not have entitled the party to relief had it been his own mistake, negligence, or inadvertence, it is equally powerless to procure him relief when attributable to his attorney. This rule will be applied though the client himself was free from all fault and the attorney through whom the judgment was suffered is insolvent, and hence cannot respond in damages: *McDaniel v. McLendon*, 85 Ga. 614, 11 S. E. 869; *Phillips v. Collier*, 87 Ga. 66, 13 S. E. 260; *Mouser v. Harmon*, 96 Ky. 591, 29 S. W. 448; *McFarland v. White*, 13 La. Ann. 394.

In some of the states, however, the negligence or mistake of an attorney is not imputable to his client, and does not debar him from obtaining relief from a judgment due thereto: *McCredy v. Woodcock*, 41 App. Div. 526, 58 N. Y. Supp. 656; *Elston v. Schilling*, 7 Rob. 74; *Meacham v. Dudley*, 6 Wend. 514; *Taylor v. Pope*, 106 N. C. 267, 19 Am. St. Rep. 530, 11 S. E. 257; *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661. This rule, though not necessarily affirmed by the court in *Searles v. Christiansen*, 5 S. Dak. 650, 60 N. W. 29, is entirely consistent with the language employed in its opinion.

II. The Rule Where the Negligence or Mistake is Such as Would Warrant Relief had It been the Negligence or Mistake of the Party.

Assuming, as has been suggested, that, "that which a person does through his agent is in law deemed to have been done by himself," the rule almost indisputably follows that, as asserted in the principal case, "where a party commits a defense to the agency of an attorney, the excusable neglect or inadvertence of the attorney, whereby judgment is taken against the party, is as much available to authorize the court to set aside the judgment as though the neglect or inadvertence had been that of the party himself." When, therefore, relief is sought by a party from a judgment taken against him through the mistake, inadvertence, surprise, or neglect of his attorney, inquiry must be made into all the attendant circumstances for the purpose of determining whether the mistake, inadvertence, surprise, or neglect is of such a character that it would warrant relief had it been due to the party rather than to the attorney, and if this question can be answered in the affirmative, relief should be granted, otherwise it should be denied: *Underwood v. Underwood*, 87 Cal. 523, 25 Pac. 1065; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425, 34 Pac. 76; *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Ordway v. Suchard*, 31 Iowa, 481; *County of Buena Vista v. I. F. & S. C. R. Co.*, 49 Iowa, 657; *Lathrop v. O'Brien*, 47 Minn. 428, 50 N. W. 530; *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181; *Hermance v. Cunningham*, 49 Neb. 897, 69 N. W. 311; *Horton v. New Pass etc. Co.*, 21 Nev. 184, 27 Pac. 376, 1018; *Springer v. Gillespie* (Tex. Civ.

App.), 56 S. W. 669. We are unable to state whether this rule is applicable in Missouri or not. The supreme court of that state, in the decisions hereinbefore cited, affirmed the general principle that a party was not entitled to relief on account of the negligence of his attorney. At a much later date, when the trial court vacated a judgment due to the neglect or misapprehension of an attorney, the supreme court refused to interfere, on the ground that the relief granted operated merely to delay the trial, and it would therefore not set aside or reverse the action of the trial court: *Scott v. Smith*, 133 Mo. 618, 34 S. W. 864.

III. Mistake of Law.

The mistake referred to in these statutes may, it seems, be a mistake of law as well as of fact. In North Carolina, a state whose courts have in general been inclined not to permit a client to suffer through the negligence of his attorneys, it has, nevertheless, been held that his inaction, due to the mistaken legal advice of his counsel, or, in other words, to a mistake of law founded upon such advice, cannot entitle him to relief: *Phifer v. Travelers' Ins. Co.*, 123 N. C. 405, 31 S. E. 715. In Wisconsin, it appeared that a court ordered an answer to be stricken out, and judgment to be entered against the defendant, unless he should give a deposition as required and comply with other conditions named in the order within a time specified. Without obeying the order, he appealed from it. This appeal resulted in an affirmance of the order and subsequently in a judgment by default being taken against him without notice. He immediately thereafter notified the plaintiff of his willingness to comply with the order, though the time for compliance as fixed therein had passed, and he applied for and secured an order of court that the answer thus stricken out might be permitted to stand and a trial of the cause had, but this order apparently without his assent was conditioned upon the payment of the costs and upon the giving of the deposition by the defendant as required, and that upon non-compliance with the condition, said judgment should operate as a final judgment in the cause. The defendant then appealed from the judgment and also from the last-mentioned order, both of which were subsequently affirmed. Thereafter the plaintiff was ordered to show cause why the default obtained against the defendant should not be opened and a trial be had. The defendant, in seeking the relief, alleged that he had followed in good faith the advice of counsel in taking his appeals. The application to open the default was refused, and the defendant appealed, and thereupon the action of the trial court was reversed, on the ground that otherwise the defendant would be held liable to pay a large sum of money "without any meritorious cause of action against him as the price of his temerity in appealing from an order of the trial court under the advice of counsel, instead of submitting thereto," and that "defaults incurred through the ill advice or negligence of counsel are to be

relieved against, as well as any others": *Whereatt v. Ellis*, 70 Wis. 207, 5 Am. St. Rep. 164, 35 N. W. 314. In another case a judgment by default was suffered, because the defendant had consulted an attorney, who, after the statement to him of the facts of the case, advised that no defense existed to the action. The court held that the mistake which would entitle a party to relief might be of law, as well as of fact, and it being conceded that the defendant was not guilty of any negligence and that his apparent laches were due solely to the mistaken advice of his attorney, relief was granted: *Douglas v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623. In another case the defendant failed to answer, because advised by his attorney that answers made by his codefendants would sufficiently protect him. Relief was denied by the trial court, but its action was reversed by the appellate court, which said: "The court seems to have considered that he was not entitled to relief because his neglect to answer was induced solely by a mistake of law. In this case we think that the court put too narrow a construction upon the statute authorizing the court to relieve a party from a judgment taken against him through his mistake or excusable neglect. A mistake of law may afford ground for relief, as well as a mistake of fact. Of course, all mistakes, whether of fact or of law, and whether committed by a party to the action or by his attorney, are not subject to relief. But this case was such that the discrimination of the court might properly have been exercised in favor of the appellant": *Baxter v. Chute*, 50 Minn. 164, 36 Am. Rep. 633, 52 N. W. 369.

STROUD v. THOMAS.

[139 Cal. 274, 72 Pac. 1008.]

A SURETY Who Signs After the Execution of the Note by His Principals and without any additional consideration for his becoming a surety is ordinarily not liable. (p. 112.)

SURETY SIGNING NOTE After Execution, but in Pursuance of Previous Agreement.—If a surety signs a note after its execution by the principal debtors, but in pursuance of a pre-existing agreement between them and the creditor that they would procure the signing of such surety if he would accept the note in satisfaction of a prior indebtedness, the execution of the note by the surety under such circumstances relates back to, and takes effect as if it had been coincident with the execution by the principal debtors. (p. 113.)

CONSIDERATION.—A Pre-existing Debt is a Sufficient Consideration for the execution of a new note, so far as the sureties thereon are concerned, if such prior debt is canceled on the delivery of the new note. (p. 113.)

SURETY—Extension of Time of Payment—When Will be Deemed Without Consideration and Insufficient to Release Surety.—

An agreement, after the maturity of a note in consideration of the payment of a part of the principal or of overdue interest, to extend the time for payment, is without consideration and does not release the surety, though the agreement is respected. (p. 113.)

PAYMENT—Extension of Time of Without Consideration.—A promise to extend the time of payment of an obligation does not bind the principal, if made without consideration. (p. 113.)

CONSIDERATION.—The Payment of Part of a Debt Already Due is not a sufficient consideration to support an agreement for forbearance to sue. (p. 114.)

J. R. Welch and William H. Jordan, for the appellant.

W. C. Kennedy and J. H. Moore, for the respondent.

274 SHAW, J. This is an action upon a promissory note executed by all the defendants. The defendant Mangrum **275** answered separately, admitting the execution of the note, and alleging as his defense that he executed the same as a surety only and without other consideration; that he signed the same after it had been signed and delivered by the principal debtors; and that afterward, and without his knowledge or consent, the plaintiff, for a valuable consideration, extended the time of payment of the note, and that thereby he was discharged. The court made its findings, and rendered judgment in favor of the plaintiff.

The defendant Mangrum thereupon moved for a new trial, which motion the court denied. The appeal is taken by the defendant Mangrum from the judgment and from the order denying his motion for a new trial.

It is contended by the appellant that he is not bound as surety on the note, for the reason that he executed it after it had been executed by the principal debtors, and that there was no additional consideration for his becoming surety thereon. If this contention were well founded, it would be a good defense to an action against him upon the note: *Leverone v. Hildreth*, 80 Cal. 139, 22 Pac. 72; *Jackson v. Jackson*, 7 Ala. 791; 3 Kent's Commentaries, 122. But the court finds, and the finding is sustained by the evidence, that the execution of the note by Mangrum was procured in pursuance of an agreement with the principal debtors, whereby they agreed with the plaintiff that they would procure Mangrum to sign the note as security, provided plaintiff would accept the note in satisfaction of a pre-existing debt. This takes the case out of the rule contended for. The execution by Mangrum, being in pursuance of the original agreement, relates back to and takes effect the same as

if it had been coincident with the execution by the principal debtors: *Pauly v. Murray*, 110 Cal. 13, 42 Pac. 313; *McNaught v. McLaughry*, 42 N. Y. 22, 1 Am. Rep. 487. The contention is further answered by the finding that the note held by the plaintiff for the old debt was retained by her until the delivery of the new note, after the execution thereof by Mangrum.

The contention of the appellant that a pre-existing debt is not a sufficient consideration for the execution of a note, so far as the sureties thereon are concerned, where the obligation for the pre-existing debt is canceled upon the delivery of ²⁷⁶ the new note, does not merit discussion. It is well settled that such a consideration is sufficient as a foundation for the promise of the sureties, as well as that of the principals: *Frey v. Clifford*, 44 Cal. 342; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659; *Scribner v. Hanke*, 116 Cal. 615, 48 Pac. 714.

It is further claimed by the appellant that there is no finding upon the allegation of his answer that he executed the note as surety, and was accepted as a surety by the plaintiff. As we have reached the conclusion that the judgment must be affirmed, even if he was a surety, it is unnecessary to determine whether the findings, properly construed, are equivalent to a finding that he signed and was accepted as a surety, or whether they should be construed to mean that he signed and was taken solely as principal.

The principal defense in the case is that arising upon the extension of time. The court finds that on August 1, 1898, after the note became due, the plaintiff received one hundred and fifty dollars on account of overdue interest, and thereupon agreed to extend the time of payment one year, and that the agreement was without consideration. The appellant claims that the receipt of the one hundred and fifty dollars as a payment upon the note was a sufficient consideration for the agreement to extend the same. The money paid was due to the plaintiff by reason of the previous obligation. No additional benefit was received by the plaintiff, and none could be conferred by the principal debtors by the payment of money on the obligation already existing and past due. This payment, therefore, merely satisfied to that extent the debt due, and did not constitute a consideration for the agreement.

A promise made without any consideration is not binding. Consequently, the agreement for the extension of time was not a valid promise, and would not bind the plaintiff to forbear

suit upon the note during the time specified in the agreement. "The payment of part of a debt by the principal, at the time or after it becomes due, is not a sufficient consideration to support an agreement for forbearance, and an agreement for forbearance founded upon such consideration, even though carried out by the creditor, will not discharge the ²⁷⁷ surety": Brandt on Suretyship, sec. 353, and cases cited; 24 Am. & Eng. Ency. of Law, 1st ed., pp. 826, 829, and cases cited; Halliday v. Hart, 30 N. Y. 474; Ingalls v. Sutliff, 36 Kan. 444, 13 Pac. 828.

It is claimed that the finding that the extension was without consideration is not justified by the evidence, because the extension was given upon the additional consideration that the principal debtor should employ the plaintiff's daughter in his business. Upon this point the court found against the contention of the appellant, and upon conflicting evidence. Hence, this court cannot interfere.

It is immaterial whether the one hundred and fifty dollars received at the time of the agreement for extension was for overdue interest or was a payment on the principal. The entire note was then due, and the effect would be the same in either case under the authorities above cited. There is no evidence that it was to be applied on advance interest.

There are no other errors alleged that require discussion.

For the reasons given the judgment and order are affirmed.

Van Dyke, J., and Angellotti, J., concurred.

Hearing in Bank denied.

The Holding of the Principal Case on the liability of a surety who signs a note in pursuance of a previous agreement is supported by *McNaught v. McClaughey*, 42 N. Y. 487, 1 Am. Rep. 487. An extension of time on a promissory note, without the consent of the surety thereon, ordinarily discharges him: *Bugh v. Crum*, 26 Ind. App. 465, 59 N. E. 1076, 84 Am. St. Rep. 307, and cases cited in the cross-reference note thereto. But it is otherwise if the contract of extension is void for want of consideration: *Davis v. Stout*, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862; *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875, 60 S. W. 499.

COWDERY v. LONDON AND SAN FRANCISCO BANK.

[139 Cal. 298, 73 Pac. 196.]

APPELLATE PROCEEDINGS—Judgment, What Amounts to a Reversal and not a Modification of.—A mandate contained in an opinion of an appellate court declaring that, for the reasons stated, the judgment is reversed and the cause remanded, with directions that the trial court enter judgment in accordance with the views here expressed, amounts to a reversal and not to a modification, though the same result might have been reached by an order directing the modification of the judgment. (p. 119.)

APPELLATE PROCEEDINGS—Reversal of Judgment, Effect of.—When an order is entered in an appellate court reversing a judgment, it is forthwith vacated, and no longer remains in existence. (p. 120.)

JUDGMENT—Reversal of—Effect of upon a Sale.—Except where the rights of third persons have intervened, the successful party upon an appeal may have the proceedings or sale vacated, either by motion in the court below, if the remittitur has been sent down, or by an independent action in any court of competent jurisdiction. He may also, in a proper case, have an action for damages as an alternative. (p. 120.)

JUDGMENT—Reversal of—Effect of upon a Sale Where the Judgment was Erroneous Only as to Its Amount.—Where, on an appeal from a judgment foreclosing a mortgage, the appellate court finds that the amount of the decree was greater than plaintiff was entitled to, and therefore orders that the judgment be reversed, with directions to the trial court to enter judgment in accordance with the views expressed by the appellate court, the appellant is entitled to have vacated the sale of his property made under the judgment, though the amount for which it was sold is less than the amount for which the plaintiff in the action is entitled to judgment in accordance with such views. (p. 121.)

JUDGMENTS AND ORDERS—Entry of.—A *Nunc Pro Tunc* Order cannot be made for the purpose of declaring that something was done which was not done. Its only office is to cause the record to show something done which was actually done, but which, through misprision or neglect was not entered at the time in the record. (p. 121.)

APPELLATE PROCEEDINGS—Action of the Trial Court After Remittitur.—A trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court. That order is conclusive on the parties, and no judgment or order different from or in addition to that directed by it can have any effect, though it may be such as the appellate court ought to have directed. (p. 122.)

APPELLATE PROCEDURE.—Where an Appellate Court, Finding the Judgment Appealed from to be for too Large an Amount, orders that it be reversed, with directions to the trial court to enter judgment in accordance with the views expressed, this direction does not authorize or permit the trial court to modify the judgment appealed from by reducing its amount. Such judgment is terminated by the reversal, and the order of the appellate court can be pursued only by the entry of a new judgment. (p. 122.)

JUDGMENT—Reversal of—Effect upon Deficiency Judgment.—Where a judgment in foreclosure is appealed from, and, after a sale made thereunder, is reversed, a deficiency judgment which was entered after such sale is vacated by the reversal. An order purporting to modify the deficiency judgment made by the trial court after such reversal is an order modifying something not in existence, and is therefore wholly inoperative. (pp. 122, 123.)

JUDGMENT REVERSED—Power of the Trial Court to Revoke or Give Effect to.—When a judgment has been reversed, with directions to the trial court to enter judgment in accordance with the views expressed by the appellate court, the former cannot, by any new order or judgment, which it may enter, make it relate back to, and preserve validity in, the original judgment, which had been vacated by the reversal. (p. 123.)

A MORTGAGE Purporting to Include Both the Land and the Rents, Profits, and Issues Thereof entitles the mortgagee, upon foreclosure, upon a proper showing of the insufficiency of the premises to pay the debt and expenses, to have a receiver appointed to take possession, collect the rents accruing during the pendency of the suit, and apply them to the debt, or if lawfully in possession without such appointment, to take such rents and profits while so in possession and apply them upon his mortgage debt. (pp. 123, 124.)

JUDGMENT—Reversal of—Right of Appellant to Rents of Property.—If, under a judgment foreclosing a mortgage which includes real property and its rents, issues, and profits, a sale is made to the mortgagee for less than the amount of the mortgage debt, under which he takes and holds possession and collects the rents, issues and profits, and the judgment is subsequently reversed because entered for too great a sum, he is not liable in an action to recover the property for the amount so collected, because, under his mortgage, he is entitled to such rents, issues and profits for the purpose of applying them to the satisfaction of his debt. (p. 124.)

Robert Harrison, for the appellant.

Charles P. Eells, for the respondent.

301 SHAW, J. This is an appeal by the plaintiff from a judgment in favor of the defendant, and from an order denying the plaintiff's motion for a new trial. The two principal questions presented, generally stated, are: 1. Whether or not a reversal of a decree of foreclosure, with directions to the court below to enter a judgment in conformity with the opinion of the appellate court, vacates the decree and affects a sale made under it, where the only change ordered was the deduction of about one thousand dollars from the sum declared due, leaving a balance larger than the purchase price of the land at the foreclosure sale; and 2. Whether or not the order of the court below modifying, by reducing the amount of it, the deficiency judgment entered after the sale, the order being made in an attempt to perform the mandate of the supreme court upon reversal, and under the circumstances hereinafter stated, is of any force or effect.

The facts are as follows: In March, 1895, the land in controversy was the property of Charles J. Bandmann, subject to a mortgage executed by Julius Bandmann to the defendant herein. At that time the defendant herein began an action in the San Francisco superior court against Julius and Charles Bandmann to foreclose the mortgage. Issues were formed, and on November 5, 1895, judgment was duly entered. On May 1, 1895, after the beginning of the action, and prior to the judgment, the land was conveyed by Charles J. Bandmann to the plaintiff, Cowdery. Process was immediately issued upon the judgment, and on December 4, 1895, the land was sold on the foreclosure decree to the plaintiff in the action, the defendant herein, for twenty-nine thousand five hundred dollars, leaving a deficiency of three thousand five hundred and seventy-four dollars and thirty-four cents, and on December 7, 1895, a deficiency judgment was entered accordingly. In July, 1896, the defendants in the foreclosure case appealed to the supreme court from the judgment given in that action, and from the whole thereof, and on March 3, 1898, the judgment was reversed. The order of reversal in the remittitur was as follows: "Wherefore, it is adjudged by the court that the judgment ³⁰² and order of the superior court in and for the city and county of San Francisco in the above-entitled matter be, and the same hereby are, reversed, and the case remanded, with directions that the trial court enter judgment in accordance with the views here expressed." On July 15, 1898, the present action was begun. The complaint consists of two counts. A general demurrer was filed to each count, and it is claimed that the first count does not state facts sufficient to constitute a cause of action. But as all the points in the case arise upon the second count, and the two relate to the same transactions, it will not be necessary to consider the sufficiency of the first count. The second count sets forth the facts aforesaid, alleges the receipt of certain rents by the purchaser subsequent to the sale, and asks that the sale under the decree be set aside and annulled, that the plaintiff be restored to possession, and that he recover the rents and profits accrued to the defendant while the property was in his possession. On November 9, 1898, the court below entered in its minutes the following order: "Pursuant to a decree of the supreme court of California, upon defendant's appeal from the judgment in this action, it is ordered that the judgment docketed in favor of plaintiff against defendant, Julius Bandmann, upon the seventh day of December, 1895, for the sum of three thou-

sand five hundred and seventy-four dollars and thirty-four cents, deficiency due plaintiff and remaining unpaid and unsatisfied after applying and crediting toward the satisfaction of the decree all the proceeds of sale of the mortgaged premises and the balance of the rents in the hands of the receivers, be modified and reduced to the sum of two thousand five hundred and twenty-six dollars and fifty cents, by deducting from said deficiency judgment the sum of one thousand and forty-seven dollars and eighty-four cents (said reduction being equivalent to one thousand dollars with interest thereon at the rate of seven per cent per annum from November 31, 1894, to said seventh day of December, 1895), and interest on said sum of one thousand and forty-seven dollars and eighty-four cents at the rate of seven per cent per annum from December 7, 1895, to April 7, 1898, the date of filing remittitur from the supreme court, and that said reduction and modification be made nunc pro tunc, as of April 7, 1898." It does not appear whether this order was made upon notice to the plaintiff in the action, or by the court ex parte, or of its own motion. The answer in this action was not filed until after the making of this order, and in the answer the defendant ³⁰³ claims that the order was substantially a compliance by the court below with the order of the supreme court reversing the judgment; that the effect of it is to leave the sale unaffected, and that the plaintiff herein is concluded thereby. The mandate contained in the opinion of the court (*London etc. Bank v. Bandmann*, 120 Cal. 225, 65 Am. St. Rep. 179, 52 Pac. 583), which is made part of the bill of exceptions in the case at bar, is as follows: "For the foregoing reasons the judgment and order are reversed and the cause remanded, with directions that the trial court enter judgment in accordance with the views here expressed." There was no appeal from any order, and the reference in the mandate to the "order" was probably a mere misprision.

The legal effect of the order of the supreme court was to reverse and vacate the judgment, and not merely to modify it. Upon a decision of the supreme court that there was material error in the action of the court below, that court may direct the character of the subsequent proceedings in the lower court, and its mandate will vary according to its views as to the proper course to be pursued. It may conclude not to reverse the judgment, but to modify it, by eliminating some portion, or by adding something to it, leaving the remaining part of the judgment below to stand affirmed and in full force and effect from the date of its original entry or rendition; or it may reverse the

judgment, which means to entirely vacate it, and may remand the cause for new trial; or if a new trial is not necessary, it may upon the reversal remand it, with directions to the lower court to enter a particular judgment. To reverse is "to overthrow; set aside; make void; annul; repeal; revoke; as, to reverse a judgment, sentence, or decree" (Century Dictionary), or, "to change to the contrary, or to a former condition" (Standard Dictionary). To the same effect, see *Laithe v. McDonald*, 7 Kan. 254; *Abbott's Law Dictionary*; *Anderson's Law Dictionary*; *Black's Law Dictionary*; *Bouvier's Law Dictionary*. The distinction between a reversal of a judgment and an affirmance with a modification is too marked and radical to justify us in disregarding it. The decision of the court as to the form of its judgment or mandate, and as to what shall be the future proceedings in the court below, is a part of its duty generally,³⁰⁴ and particularly under section 957 of the Code of Civil Procedure, and as such it is presumed to have received the same consideration as any other feature in the case. We are bound to assume that this court in this case acted advisedly and deliberately, and had good reason for ordering a reversal rather than a modification and affirmance. The part of the order directing the entry of a new judgment related solely to the proceedings after the reversal and the return of the case to the court below, and was not intended to, nor could it, change the reversal to a mere modification. Neither can the fact that it may now appear to us that the same result could have been reached by a modification justify this court in now changing the effect of the mandate.

The effect of an order of reversal upon the judgment reversed is not left in doubt by the decisions in this state. In *Reynolds v. Hosmer*, 45 Cal. 628, the court says: "When the supreme court reversed the judgment of the circuit court, . . . and its mandate was filed in the lower court, . . . the judgment was reversed, whether the lower court afterward made any order conforming its judgment to that of the supreme court or not." In *Estate of Mitchell*, 126 Cal. 250, 58 Pac. 550, it is said: "When the order . . . was reversed, it no longer had any vitality or force, and the result was to leave the proceeding where it stood before that order was made." When a decree is reversed, it is vacated, and the matter stands "as though no decree had ever been made": *Ashton v. Heydenfeldt*, 124 Cal. 17, 56 Pac. 624. When a judgment is reversed, "it is as if never rendered": *Raun v. Reynolds*, 18 Cal. 290. When the order of the supreme

court in the case of *London etc. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583, was made, reversing the judgment of the court below, that judgment was forthwith vacated, and until action was taken by the court below in pursuance of the mandate to enter another judgment in accordance with the opinion of the supreme court, there was no judgment in existence in the case.

The decisions are equally clear with regard to the effect of an order of reversal upon a sale or other proceeding had under the judgment reversed, during the pendency of the appeal. Except where the rights of third persons have intervened, ³⁰⁵ the successful party upon the appeal may have the proceedings or sale vacated, either by motion in the action in the court below after the remittitur has been sent down or by independent action in any court of competent jurisdiction. He may also, in a proper case, have an action for damages as an alternative: *Reynolds v. Hosmer*, 45 Cal. 628. "A party obtaining through a judgment, before reversal, any advantage or benefit, must restore what he got to the other party, after the reversal": *Reynolds v. Harris*, 14 Cal. 681, 76 Am. Dec. 459. "The true condition of the sale—as valid or invalid—we consider to be this: The sale was valid at the time it was made; but the plaintiff in the execution having become the purchaser, it was liable to be set aside upon a reversal or modification of the judgment by this court, or by the court below upon the return of the case, upon motion": *Johnson v. Lamping*, 34 Cal. 301. "The rule is well settled in this state that, upon the reversal of a judgment, a sale to the plaintiff of the defendant's property for the satisfaction of the judgment in whole or in part will be set aside. The reason for this rule is, that, as the plaintiff's claim to have the property sold depends upon the judgment, the reversal of the judgment destroys this claim": *Barnhart v. Edwards*, 128 Cal. 576, 61 Pac. 176; *Carpy v. Dowdell*, 131 Cal. 500, 63 Pac. 780.

The case of *Jesup v. Bank*, 15 Wis. 604, 82 Am. Dec. 703, is cited as holding that a reversal does not vacate a sale to the plaintiff where the reversal was for an error in the amount of the judgment, which, being corrected, left a balance exceeding the price at the sale. The decision is as it is claimed to be, but the opinion is brief, and apparently no consideration is given to the meaning and effect of the terms used in a judicial mandate. We do not feel at liberty to follow it. As above stated, this court, when it reverses a judgment, is required, by section 957 of the Code of Civil Procedure, to determine what it will do

toward the restitution of property sold under the erroneous decree. When it has made its determination of this matter, and decided to lay the foundation for a restitution, by reversing the judgment, instead of modifying it, as it could have done, the decision so made should not be disregarded, nor should it be subject to revision in a subsequent ³⁹⁶ case based on the mandate, and instituted for the purpose of obtaining the restitution so provided for.

It follows from these authorities that the plaintiff in this action is entitled to judgment setting aside the sale, and for the recovery of the possession of the property, unless there is something in the effect of the minute order of the court below, purporting to have been made in pursuance of the mandate of the supreme court, which produces a different result. It is necessary, therefore, to consider the question of the validity and effect of that order.

That part of the order directing that it be made *nunc pro tunc*, as of April 7, 1898, is of no force. It is not claimed that the court did in fact make the order on that date, nor that it made any order or took any action in the case whatever at that time. A *nunc pro tunc* order cannot be made for the purpose of declaring that something was done which was not done. Its only office is to cause the record to show something done which was actually done, but which, by misprision or neglect, was not at the time entered in the record. It is as if the court, finding there had been a failure to enter an order actually made on a day previous, had directed the clerk to turn back to the page or part of the record containing the entries for that day and there enter the order in its proper place. For want of space, this cannot usually be done, and it ought not to be done, because for some purposes an order not entered has no effect, and therefore the record should show the date of the actual entry and also the date of theoretical entry—that is, the date the order was actually made. And so the entry is written in the records of the day of actual entry, but the court directs that it have effect as an entry of the day the original order was made. But there is no power in the court in any case to declare that an order shall be so entered that it shall have effect or shall appear to have been made on a previous day, where in fact it was not made on that day. The court cannot in this manner declare that a thing was done which might have been or should have been done, but which was not done. The order in question can be considered only as an order made on November 9, 1898.

The mandate of reversal did not authorize the trial court to modify the judgment in the manner attempted by this order.

³⁰⁷ "No modification of the judgment or decree directed by the appellate tribunal can be made by the trial court; no provision can be ingrafted upon it, nor can any be taken from it": Elliott on Appellate Procedure, sec. 576; Hughes' Appeal, 90 Pa. St. 60; Murrill v. Murrill, 90 N. C. 122. Where the supreme court directed the entry of a certain judgment, it was said, in Argenti v. Sawyer, 32 Cal. 415, that the lower court "had no authority to enter a different judgment. The duty of that court was simply to enter a judgment in conformity with the order of this court. That order is decisive of the character of the judgment to which the plaintiff is entitled. It is therefore unnecessary to consider whether the original judgment should have been ordered to be modified, or whether the plaintiff was entitled to interest upon interest, or whether the judgment of this court would have been modified if it had been asked for in proper time. . . . The judgment of this court concludes the parties, and it is now too late to change it; and certainly the district court has no authority to modify, change, or disregard it in any respect." In such a case the trial court "must enter the judgment directed, and the entry of a different judgment is void" (Chafoin v. Rich, 92 Cal. 473, 28 Pac. 488); and if the court has retried the case, and upon the new trial "had rendered a judgment, it would have been void": Heinlen v. Martin, 59 Cal. 182. To the same effect, see Argenti v. San Francisco, 30 Cal. 467; Will v. Sinkwitz, 41 Cal. 588; Keller v. Lewis, 56 Cal. 469; Green v. Springfield, 130 Ill. 519.

And, in any respect, the order in question was without effect on the right of the plaintiff to have the sale vacated. This court decided that the judgment below was too large, to the extent of one thousand dollars, with interest thereon at seven per cent per annum from March 31, 1894, and, upon the reversal, the court below was directed to enter judgment accordingly. This could not be done by modifying the previous judgment, for, as we have seen, that judgment was vacated by the reversal; it was "as if never rendered," and there was nothing in existence to modify. The deficiency judgment entered in pursuance of the decree that was reversed, became a part of it, and the effect of the reversal was to vacate that judgment also. The order of November 9, 1898, therefore, ³⁰⁸ purports to modify something that did not then exist. As a modifying order, it was totally ineffectual.

Viewed as an independent order, it could have no effect as a foundation for the foreclosure sale. It does not purport to foreclose any mortgage, nor to order a sale of the land. It was not the entry of a new judgment in pursuance of the mandate. The case still stands as an action pending, with final judgment remaining to be entered.

And if it could be considered, by reason of its reference to the former decree, as a re-entry or resurrection of that decree, with the change indicated by the opinion of this court incorporated therein, still it would be effective only as the entry of a new judgment, which would act only from its date, and could give no validity to a sale made under the former decree. There was no power in the superior court to make it relate back to, and preserve vitality in, the original judgment which the supreme court had vacated. In view of these conclusions as to the effect of the order, it will be unnecessary to consider the question whether or not it is appealable.

It is apparent, therefore, that as the court below acted on the theory that the trial court in *London etc. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 503, had power to disregard the mandate of the supreme court, and modify the previous judgment, allowing it, thus modified, to stand as valid from its date, instead of treating it as reversed, and therefore vacated, its judgment in this case was erroneous and must be reversed.

The complaint asks judgment for rents during the time the defendant has been in possession as purchaser under the former decree. The mortgage of Bandmann to defendant includes both the land and "the rents, issues, and profits thereof." The plaintiff, Cowdery, is a purchaser with notice of the mortgage. Where a mortgage includes rents and profits, the mortgagee, upon foreclosure, may, upon a proper showing of the insufficiency of the premises to pay the debt and expenses, have a receiver appointed to take possession, collect the rents accruing during the pendency of suit, and apply them upon the debt: *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Jones on Mortgages*, 5th ed., secs. 669, 670. A distinction is made in this state between ³⁰⁹ the rents and profits, as such, and the corpus of the growing crops, it being held that the statutory mode of mortgaging crops as chattels is exclusive, and that a clause mortgaging the rents, issues and profits, in a mortgage not executed in the form prescribed for chattel mortgages, is ineffectual to give

the mortgagee any lien on, or right to, the growing crops, even after the appointment of a receiver, as against third persons, who are in the position of purchasers for value with or without notice: *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45; *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006; *Modesto Bank v. Owens*, 121 Cal. 223, 53 Pac. 552; *Locke v. Klunkner*, 123 Cal. 235, 55 Pac. 993. The reason for this distinction is, that the clause relating to rents, issues, and profits, so far as it could apply to growing crops, is absolutely void as to third persons, and there being no mortgage, pledge or contract embracing the crops, they have the status of any other chattel not mortgaged, and the mortgagee cannot take them in a proceeding to enforce the mortgage. The same rule applies to any chattels included in a mortgage of realty, not executed as required for a mortgage of personalty: *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76. The same authorities recognize the right of the mortgagee lawfully in possession, either through a receiver appointed at his instance or in his own proper person, without the appointment of a receiver, to take the rents, issues and profits accruing to him while so in possession, and apply them upon the mortgage debt, where the mortgage, as in this case, covers the rents, issues, and profits. It follows that the plaintiff is not entitled to recover the rents accruing during the possession of the defendant, or after the appointment of a receiver. His only remedy is to have them applied on the mortgage debt.

The judgment and order denying the plaintiff's motion for a new trial are reversed and the cause remanded for further proceedings in accordance with this opinion.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

OF THE REVERSAL OF JUDGMENTS.

- I. What is a Reversal of a Judgment.
- II. Includes Every Part of the Judgment.
- III. Limiting the Reversal to Parties Before the Court.
- IV. The Effect of the Reversal.
 - a. The General Rule.
 - b. The Reversal Places the Parties Where They were Before the Error was Committed.

- c. Reversal of Reversal.
- d. Annuls all Proceedings and Orders Founded on It and All Judgments Which cannot Stand Without Denying It Effect.
- e. Terminates Effect of Judgment as Res Judicata and as a Merger.
- V. Limitation upon the Effect of the Reversal of a Judgment.
- VI. Loss of Title by Reversal Where No Sale or Conveyance has been Made Under the Judgment.
 - a. By Third Persons.
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- VII. Restitution After the Reversal of a Judgment Where Property has been Transferred Under It.
 - a. Where a Stranger Purchased at the Sale.
 - b. Where the Plaintiff Purchased at the Sale.
 - c. Where the Assignee of the Judgment or Other Person Beneficially Interested Purchased.
 - d. Where the Purchase was by Plaintiff's Attorney.
 - e. Where a Purchasing Plaintiff has Transferred the Bid or the Property to Another.
 - f. Title, Whether Remains in the Purchasing Plaintiff until the Defendant Elects to Disaffirm the Sale.
- VIII. Proceedings for Restitution upon the Reversal of a Judgment.
 - a. Right to Restitution is Always Implied.
 - b. Order for Restitution in the Appellate Court.
 - c. Proceedings in the Trial Court.
 - d. Enforcing Restitution by Independent Actions.
 - e. Payment of the Reversed Judgment as a Defense to the Same Action.
 - f. Restitution by an Appellant Who has Collected His Judgment.
 - g. The Statute of Limitations Against the Enforcement of the Right to Restitution.
 - h. Discretion to Refuse Restitution.
 - i. The Amount of the Recovery.

I. What is a Reversal of a Judgment.

We know of no decision other than that in the principal case which formulates any test by which to determine what, in most cases, must be regarded as a reversal of a judgment. Unquestionably to reverse is to vacate or set aside, but it does not include any other affirmative action unless specially directed by the appellate court. Hence the reversal of a judgment in favor of a party and the remanding of the case to the trial court does not warrant the entry of a judgment therein against him and in favor of his adversary: *Laithe v. McDonald*, 7 Kan. 254. Whether a judgment is to be vacated or merely modified, and whether, if vacated, some other final judgment shall be entered in the trial court without any further trial, are questions to be determined by the appellate court, and their determination must be sought for in its opinion and order, and while doubtless the opinion may be referred to in construing an ambiguous order, the order, when free from ambiguity, cannot be set right or modified by the opinion. If an order declares that the judgment is reversed, it must be treated as at an end, and cannot, by any modification or amendment, be permitted to stand,

though it might be purged of the error which the appellate court found in it by such modification or amendment: *Cowdery v. London etc. Bank*, 139 Cal. 298, ante, p. 115, 73 Pac. 196. See, also, *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742. Though the rule laid down in the principal case is probably the better and safer one, it is equally probable that appellate courts sometimes, and perhaps often, enter orders of reversal without having in mind the questions which may afterward be presented because of proceedings taken under a judgment while it remained in force and entitled to be executed, and when, in view of those questions, a modification rather than a reversal should have been directed, and when this occurs, it is difficult to resist the inclination to act as though a modification had been directed instead of a reversal. Thus, in *Jessup v. City Bank of Racine*, 14 Wis. 359, which was an action to foreclose a mortgage to secure certain bonds issued by a railroad corporation, it was found that the stipulation of the bonds making the principal due upon default in the payment of interest was not authorized by the resolution of the corporation directing their execution, and hence that the judgment appealed from was erroneous in so far as it directed a foreclosure for both principal and interest. The direction accompanying the opinion was, "The judgment is reversed with costs and the cause remanded for further proceedings." After the remittitur was returned to the trial court, it entered an order vacating the sale which had taken place under this judgment before its reversal. It is true that it did not declare that the judgment in foreclosure had, notwithstanding this order, been merely modified, or that such judgment had not been vacated or set aside. It, however, accomplished substantially the same purpose by declaring that, though the sale had been made to the plaintiff, his title did not fail by reason of the reversal, but it insisted that the principle ordinarily applicable to the reversal of a judgment when a plaintiff has purchased "should not be applied to a sale on a mortgage foreclosure where the reversal does not defeat the entire mortgage debt, even though the mortgagee be the purchaser. In such a case, it should be shown that there was some unfairness in the sale, or that the property would, on a resale, bring a larger amount than that bid at the first sale": *Jessup v. City Bank of Racine*, 15 Wis. 604, 82 Am. Dec. 703.

The modification of a judgment or its reversal in part present questions entirely different from those arising upon an absolute and unqualified reversal, the former questions will not be fully considered in this note. It suffices our present purpose to say that in such cases the original judgment is not obliterated, and sales or other proceedings which have taken place under it may still be sustained: *Yndart v. Den*, 125 Cal. 85, 57 Pac. 761; *Barnhart v. Edwards*, 128 Cal. 572, 61 Pac. 176; *Falk v. Ferdheim B. Co. (Kan.)*, 72 Pac. 531; *Sage v. Clopper*, 19 Tex. Civ. App. 502, 48 S. W. 36;

Shepherd v. Chapman, 83 Va. 215, 2 S. E. 273; except where they would have been unauthorized had the judgment as first entered been free from the error on account of which it was modified or reversed in part: Adams v. Odom, 74 Tex. 206, 15 Am. St. Rep. 827, 12 S. W. 34.

II. Includes Every Part of the Judgment.

Assuming, as we must, from the principal case, that a general order directing a reversal is conclusive that the judgment is not to be modified or amended, but is, on the contrary, to be set aside or vacated, it necessarily follows that a reversal extends to every part or provision of the judgment, whether or not it is specially named in the order or considered in the opinion. The reversal cannot, unless the appellate court so directs, be limited in effect to the part of the judgment which is found to be erroneous: Davis v. Headley, 22 N. J. Eq. 115; Effinger v. Kenney, 92 Va. 245, 23 S. E. 742; or to some only of the parties: Carthage etc. L. Co. v. Bauman, 55 Mo. App. 204. Much less can any provision remain in force which was intended to carry the judgment into effect, or to make the relief granted more effective, as where it appointed a receiver: Roanoke St. Ry. Co. v. Hicks, 96 Va. 510, 32 S. E. 295; or directed the issuing of a perpetual injunction: McGarrahan v. Maxwell, 28 Cal. 75.

III. Limiting the Reversal to Parties Before the Court.

It is surely essential to the operation of a judgment of an appellate court that it have jurisdiction of the parties to be affected. It necessarily follows that the effect of a reversal must be restricted to the parties who, by notice or other process, have been made parties to the appeal. Hence, if in a suit to foreclose mortgages, a decree is entered giving one of the mortgagees priority over the other in the distribution of the proceeds of the sale, and the latter appeals, but without making the mortgagor a party to the appeal, and obtains a reversal, it cannot in any wise prejudice the mortgagor, nor expose him to another trial, nor entitle the appellant to have the sale vacated, though made to a party to the suit: Little v. Superior Court, 74 Cal. 219, 15 Pac. 731; Withers v. Jacks, 79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824. If there are two or more defendants or other parties before the court, and a judgment is found to be erroneous as to some, but not so as to the others, and it is, though joint in form, several in effect, it may be reversed as to some, and affirmed as to others: Rees v. City of Chicago, 38 Ill. 322; Pittsburgh etc. R. Co. v. Reno, 123 Ill. 273, 14 N. E. 195; Bullis v. Montgomery, 50 N. Y. 352; and in some instances, though the appeal is prosecuted by one only of the judgment debtors, the reversal may be effective where the liability of the defendants is several: Belden v. Andrews, 43 N. Y. Supp. 587, 14 App. Div. 630. We may easily conceive a case in which an appeal has been prosecuted without serving a notice on all the parties who might be prejudiced by a reversal, and this defect escaping the attention of the court. the

judgment has been reversed. The reversal may be given effect as between the parties before the court so far as it is possible to do so without prejudicing the other parties, but doubtless there can be no new trial or other relief against them to which they object.

IV. The Effect of the Reversal.

a. The General Rule.—Upon the reversal of a judgment without qualification on the part of the reversing court, it must, for most purposes, be treated as no longer in existence, and for some purposes, as if it never had at any time existed. It is no longer subject to modification or amendment, nor can anyone successfully claim the right to enforce any of its provisions or to require obedience to any of its mandates. The appellant is restored to the position in which he was before the judgment was pronounced against him: *Jones v. Dyer*, 20 Ala. 373; *Williams v. Simmons*, 22 Ala. 425; *Phelan v. San Francisco*, 9 Cal. 15; *Baun v. Reynolds*, 18 Cal. 275; *Ragan v. Cuyler*, 24 Ga. 400; *Mohler v. Wiltberger*, 74 Ill. 163; *Harris v. Newman*, 5 How. (Miss.) 654; *Devlin v. Mayor etc.*, 4 Misc. Rep. 106, 23 N. Y. Supp. 888; *People v. Bowe*, 20 Hun, 85. To reach this end it is not necessary that any further order or proceeding be taken in the trial court: *Cox v. Pruitt*, 25 Ind. 90.

b. The Reversal Places the Parties Where They were Before the Error was Committed.—A party whose judgment has been reversed can no longer avail himself of it or of the erroneous view of the law upon which it was founded. He must relinquish all advantages obtained by it and must take his place in the trial court at the point where the error occurred, and proceed thence to the final decision: *Nelson v. Hubbard*, 13 Ark. 253; *Harrison v. Trader*, 29 Ark. 85; *Follansbee v. Scottish-American M. Co.*, 7 Ill. App. 486; *Schumann v. Helberg*, 62 Ill. App. 218. For some purposes he must even relinquish the advantages which he had gained up to that point. The trial and the other proceedings may have been unquestionably regular and the findings of the lower court may have been abundantly supported by the evidence, and its only error may have been in an erroneous conclusion which it drew from such finding or in giving some relief in excess of, or different from, that approved by the appellate court, and the respondent or appellee may seek to take up the case where the error occurred, and thus avoid a new trial, or to restrict the trial to some question in respect to which the action of the trial court has been found erroneous. Generally, however, an unqualified reversal entitles the appellant to a new trial as a matter of right and entirely unembarrassed by anything which occurred at the former trial: *Talcott v. Delta Co. etc. Co.* (Colo. App.), 73 Pac. 256; *Goodman v. Turner*, 94 Ill. App. 530; *Commissioners of Montgomery Co. v. Carey*, 1 Ohio St. 463; *Zanesville Gas-light Co. v. Zanesville*, 47 Ohio St. 35, 23 N. E. 60. The only decisions of which we are aware which may conflict with these views

were made in California and Montana. At the second trial of *Chandler v. People's Sav. Bank*, 73 Cal. 317, 2 Am. St. Rep. 812, 14 Pac. 864, the court rejected certain evidence offered to show that balances found to be due from one party to another were "of a kind which bore interest." The appellate court conceiving this action to be erroneous, directed that the judgment be reversed "and the cause remanded that there may be a new trial": *Chandler v. Peoples' Sav. Bank*, 65 Cal. 498, 4 Pac. 502. When the third trial took place "the court heard testimony in reference to the character of the balances mentioned in the direction, and excluded testimony relating to other portions of the case." Its action in this respect was sustained, on the ground that, under the former decision it was not incumbent on it to try the entire cause anew. An exceptional case in Montana also led to an exceptional decision. As the result of the first trial, the jury returned a general verdict for the plaintiff, and also found upon special issues submitted by the court. Thereupon the plaintiffs moved for a decree in their favor, and the defendants moved to set aside the general verdict and for a judgment on the special findings. The plaintiffs' motion was sustained and that of the defendants denied. On appeal, the supreme court in its opinion declared that the action was one for both legal and equitable relief, and for that reason could not be sustained under the organic act of the territory as construed by the supreme court of the United States, but that upon the findings on the special issues the defendants were entitled to judgment, and a general order was entered that the cause be reversed and remanded. Before it was called for the second trial, the supreme court of the United States changed its views respecting the organic act of the territory, and thereby removed the objection that the action could not be sustained because it involved the granting of both legal and equitable relief. On the first appeal there was no complaint against the findings of the jury upon the special issues, and the question presented to the trial court at the second trial was whether it might proceed on its findings, or must submit the issues to a jury upon such evidence as might be produced. It determined that a further trial was unnecessary, and entered judgment in favor of the defendants upon the special findings made by the jury at the former trial, and its action in so doing was sustained on appeal, on the ground that a reversal of a judgment is not always equivalent to an order granting a new trial; that, in determining what effect should be given a judgment of reversal, the opinion of the appellate court may be examined, and that there was nothing in such opinion that could be construed as reversing the judgment for any error in the trial before the jury; that the reversal might be construed as a remanding of the cause to correct the pleadings so as to eliminate therefrom either the legal or the equitable cause of action; and that, as the change in the views of the supreme court of the United States had rendered this correction unnecessary, the order remanding the cause

for this purpose became inoperative, and all the facts necessary to warrant the court in entering the judgment having been found, it committed no error in proceeding to enter such judgment without any further trial. "We hold," said the court, "that where the error complained of occurs subsequent to the trial, and where a general verdict or a special verdict shows facts found by the court or jury, and these are not controverted, and they are sufficient to warrant what we deem a correct judgment, then the judgment of this court to the effect that the judgment of the court below is reversed and cause remanded, should not be construed as granting a new trial, but as putting the parties back to the stage of the case where the error occurred for which the judgment was reversed": *Woolman v. Garringer*, 2 Mont. 405.

There are doubtless some limitations upon the rule that the reversal of a judgment places the parties in the same position as when it was rendered, at least to the extent of protecting third parties. Their acts done under the judgment must stand if done while its force was not suspended by an appeal or a bond to stay execution, and there are some contingencies in which, even as between the parties, no remedy exists for placing them in statu quo. Thus a judgment may be received in evidence in an action between them, and upon such evidence a further judgment may be recovered, after which the original judgment may be reversed. This reversal does not carry with it the judgment in the second action or proceeding, nor do we know of any means by which the successful appellant may secure the full fruits of his victory by vacating or otherwise avoiding the effect of the judgment which resulted from the admission in evidence of the reversed judgment before its reversal: *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384, 18 N. E. 123.

c. Reversal of Reversal.—If the judgment appealed from is one vacating a judgment or that of an intermediate court which has reversed the judgment of a court subordinate to it, the judgment of reversal entered by the paramount appellate court necessarily revives or reinstates the original judgment which has been adjudged to have been erroneously vacated or reversed: *In re Mitchell's Estate*, 126 Cal. 248, 58 Pac. 549; *Ragan v. Cuyler*, 24 Ga. 397; *Coalfield C. Co. v. Peck*, 105 Ill. 529.

d. Annuls All Proceedings and Orders Founded on It and All Judgments Which cannot Stand Without Denying It Effect.—If an appeal is taken from an order denying a motion for a new trial, and such order is reversed, the reversal is, in its operation, equivalent to an order reversing the judgment, though no appeal was taken from it: *Fulton v. Hanna*, 40 Cal. 278; *Bauder v. Tyrrel*, 59 Cal. 99. During the progress of the cause certain errors may occur, as in refusing to grant a change of the place of trial (*Howell v. Thompson*, 70 Cal. 635, 11 Pac. 789), or in making one a party defendant (*Knox v. Laird*, 92 Ga. 123, 17 S. E. 988), or in allowing an amendment to a pleading (*Burch v. Swift* (Ga.), 43 S. E. 64), and an appeal

may be taken which does not have the effect of staying further proceedings, but which results in a reversal of the order complained of. In the meantime, the parties may have proceeded to prosecute the action to final judgment. We are not able to affirm that the reversal of the erroneous order ipso facto reverses the judgment. If, however, it has been appealed from, it will be reversed without any further inquiry. If parties in chancery proceed under an interlocutory decree to a final hearing and decree, they do so at the risk of having such decree vacated in the court where entered, if the interlocutory decree is reversed in the higher court: *Barton v. Long*, 45 N. J. Eq. 160, 16 Atl. 683. Whether this result follows in an action at law or one under the codes of procedure in force in many of the states we are unable to state, but in New York, it has been said that, upon such a reversal of an interlocutory judgment, the final judgment becomes a nullity, and should be stricken from the records on motion: *Agate v. House*, 69 Hun, 616, 23 N. Y. Supp. 716; *Weinberg v. Frank*, 56 N. Y. Supp. 920, 25 Misc. Rep. 788. So, speaking of an interlocutory decree which found the amount due in a suit to foreclose a mortgage, the supreme court of the United States said that it was "the foundation of the right of the mortgagee to proceed, and a substantial error in that finding must, on appeal, vitiate the subsequent proceedings": *Chicago etc. R. Co. v. Fosdick*, 106 U. S. 71, 1 Sup. Ct. Rep. 10.

We have already suggested, that if one judgment has been made the foundation of another, we know of no proceeding by which, after the reversal of the former, such reversal may be made to operate upon the latter, and thus be made fully effective, unless, indeed, when the latter has been brought before the higher court on appeal. Where such is the case, and it is made known to the appellate court in any proper manner that the judgment before it is founded upon, or the result of, another judgment which has been reversed, it will reverse the judgment so before it without any further inquiry: *Fowler v. Gibson*, 4 Pike (Ark.), 427; *Smith v. Kansas City etc. R. Co.*, 49 Mo. App. 54; *Steelman v. Ackley*, 2 N. J. L. 99; *Anderson v. Radley*, 3 N. J. L. 1034; *Jones v. Gillespie*, 32 W. Va. 343, 9 S. E. 235; *Butler v. Eaton*, 141 U. S. 240, 11 Sup. Ct. Rep. 985. It does not, however, necessarily follow that if no appeal had been taken from the second judgment, and hence no formal order had been obtained for its reversal, that it can nevertheless, be regarded as annulled by the reversal of the prior judgment out of which it grew. In Kentucky something like this result was brought about in *Board of Councilmen v. Deposit Bank*, 23 Ky. Law Rep. 1285, 65 S. W. 10. A decree had been entered in a state court, in consequence of which a national court, in a cause subsequently brought before it, held that the plaintiff was precluded from recovering certain taxes. Thereafter the plaintiff brought suit in the state court, and the judgment of the national court was pleaded in bar. In the meantime, the judgment in the state court by which the

national court had been controlled had been reversed, and this, in the opinion of the state court, justified it in disregarding the judgment of the national court: *Board of Councilmen v. Deposit Bank*, 23 Ky. Law Rep. 1285, 65 S. W. 10.

Perhaps a distinction may be made between judgments in different actions, the later being founded upon the earlier, and judgments in the same action or proceeding where the later is dependent upon, or in aid of, or the result of, the execution of the other. A judgment in one action may be founded upon a judgment in another, and yet there may be nothing in the record to establish this fact, in which case it would be extremely difficult to maintain that, upon the reversal of the first judgment, the second became inoperative or void. If one decree is dependent upon another in the same suit, this must ordinarily, if not universally, appear from an inspection of the second decree, or, at all events, of it and the other records in the case, and, upon the reversal of the first decree, the second decree may be regarded as at an end in the extreme sense that no appeal may be taken from it, or if taken, may be dismissed: *Chicago D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10. If an order directing the sale of property is reversed, an order affirming the sale may be treated as also terminated, if the sale was made to a party to the suit: *Troop v. Horbach*, 62 Neb. 564, 87 N. W. 316; otherwise, if made to one who, by the decision of the highest court of the state, may retain title notwithstanding the errors which have induced the reversal of an order of sale: *May v. Ball*, 22 Ky. Law Rep. 1681, 60 S. W. 722; *Talbott v. Campbell*, 23 Ky. Law Rep. 2198, 67 S. W. 53.

For the purpose of enforcing the payment of a judgment proceedings in garnishment may be instituted. Doubtless, where they have not resulted in a judgment against the garnishee, the reversal of the original judgment renders the garnishment inoperative, and no further proceeding need be taken to have it so declared: *Clough v. Buck*, 6 Neb. 343. Before the original judgment is reversed, judgment may have been secured against the garnishee. Such judgment, as between the parties thereto, seems to be a mere incident of the original judgment, existing solely for the purpose of contributing to its payment and becoming of no further effect when the right to such payment terminates. Hence if the original judgment is reversed, the right to collect the judgment in garnishment is irretrievably lost, and does not revive on the recovery by the plaintiff of another judgment in the original action: *Decatur v. Simpson* (Iowa), 93 N. W. 496.

e. Terminates Effect of Judgment as Res Judicata and as a Merger.—After a judgment has been reversed, it is rarely admissible in evidence in any subsequent action or proceeding: *Atkinson v. Dixon*, 96 Mo. 577, 10 S. W. 163. Its effect as res judicata is at an end. Neither party can be estopped by it: *McCallister v. Bridges*, 19 Ky. Law Rep. 107, 40 S. W. 70; *Mattingly v. Lewisohn*,

13 Mont. 508, 35 Pac. 111; *Commercial Bank v. Sherwood*, 162 N. Y. 310, 56 N. E. 834; *Stewart v. Register*, 108 N. C. 588, 13 S. E. 234; *Mills Co. v. Brown Co.*, 10 Tex. Civ. App. 356 30 S. W. 476. It hence follows that though the court reversing the judgment apparently determines a question of law or of fact, which, upon a second trial, must lead to a decision against the party, yet if it merely reverses the judgment and remands the proceedings to the trial court, he may, by dismissing the action before a second trial can be had, avoid the effect of the determination thus made against him: *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 8 Sup. Ct. Rep. 974.

It necessarily follows from the views already expressed that, if a plaintiff recovers a judgment which, if permitted to stand, merges the cause of action and prevents any further recovery thereon, yet that the reversal of the judgment leaves the plaintiff in the same position as before it was entered, and hence free to bring another action upon the same cause: *Goodrich v. Bodurtha*, 6 Gray, 323; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603.

V. Limitation upon the Effect of the Reversal of a Judgment.

"An erroneous judgment is the act of the court. Until vacated upon appeal, or by some other appropriate proceeding, all persons may treat it as valid, unless we may except from this rule the parties to the suit and their attorneys, and even they are affected by its reversal no further than by being liable to make restitution of the property in their hands acquired under such judgment. But the distinction between a void and an erroneous judgment must be kept in view, for, if a judgment is void, no rights can be based upon it. The reversal of a judgment on appeal, on the ground, not of errors in proceeding, but because the lower court had no authority to proceed, would be in legal effect a declaration that the judgment was void. The judgment may not be wholly void, and yet be substantially so, because the parties whose interest was sought to be affected were not before the court. Their title cannot be imperiled, whether there is an appeal or not. If an appeal is taken, and a reversal ordered on this ground, the defect of parties is judicially declared: *Underwood v. Pack*, 23 W. Va. 704; *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. 561; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. Titles resting on such judgment will, therefore, be declared invalid. But this invalidity arises, not from the reversal, but from the original judgment, which is found to be so destitute of legal authority that it might have been disregarded by the parties, even if no proceedings had been taken for its reversal. If a judgment is so far valid that it is necessary for the party against whom it is given to resort to an appeal to avoid its effect he must, in order to prevent its execution, stay proceedings by giving a sufficient undertaking on appeal. If he does not do this, an execution may be taken out and levied upon his property. The officer serving the writ is justified in proceeding regardless of the appeal, and is not deprived of the

protection of his process by the subsequent reversal of the judgment": Freeman on Executions, sec. 345.

We shall hereafter treat of the restitution to which the appellant is entitled upon the reversal of a judgment against him. Subject to this right of restitution in the cases where it exists, it may be affirmed as a general rule that, whatever is done by authority of a judgment which is not absolutely void must, as between the parties thereto, be regarded as authorized, if done before its reversal and when its effect was not suspended by an appeal or some other proceeding suspending the right to its enforcement: *Florida C. R. Co. v. Bisbee*, 18 Fla. 60. It constitutes a justification for all acts done in obedience to it until such reversal (*Simpson v. Horenbeck*, 3 Lans. 53), and hence no action is sustainable by the appellant for damages resulting from such acts (*Bridges v. McAllister*, 106 Ky. 791, 90 Am. St. Rep. 267, 51 S. W. 603), nor for moneys paid in obedience to the judgment (*Peek v. Peek*, 21 Ky. Law Rep. 15, 50 S. W. 982; *Stephens v. Willis*, 21 Ky. Law Rep. 170, 51 S. W. 9; *Fidelity T. & S. V. Co. v. Louisville B. Co.*, 22 Ky. Law Rep. 802, 58 S. W. 712; *Langley v. Warner*, 3 N. Y. 327), though such payment may have been made by an agent or attorney of the respondent or appellee: *Green v. Brengle*, 84 Va. 913, 6 S. E. 603; *Bank of United States v. Bank of Washington*, 6 Pet. 8.

VI. Loss of Title by Reversal Where No Sale or Conveyance has been Made Under the Judgment.

a. **By Third Persons.**—The loss of title by reversal may be considered, first, in those cases in which, though there has been no sale or conveyance of title under process issued for the enforcement of the judgment or decree, there has been an adjudication that the title or right to possession belonged to some party, after which he has made a sale to another whose purchase was induced by his reliance on such adjudication. If the purchase is made after the taking of an appeal or during the pendency of a writ of error, there is no doubt, we believe, that the purchaser's title remains subject to the final decision of the appellate court, and hence is lost if that result in a reversal: *Kirkland v. Trott*, 75 Ala. 221; *Real Estate Sav. Co. v. Collonious*, 63 Mo. 290; *Carr v. Cates*, 96 Mo. 271, 9 S. W. 659. Very great doubt does exist, however, when the purchase is made after the entry of the judgment and before the prosecution of any proceeding to avoid it for error. To us it appears the more reasonable to hold that all purchasers are charged with notice of the law, or, in other words, that the adjudication on which they rely is subject to assault by appeal or writ of error, and to be overthrown if it appears to the appellate court to be erroneous; that the right to so assail the decree or judgment within the time allowed by law is substantially impaired, if the party in whose favor it exists may avoid restitution by making a sale of the property to a third person before the notice of appeal is filed or writ of error sued out;

and hence the rule should be that, on the reversal of the judgment, such purchaser can no longer rely on its protection, for the purpose of holding the property against the successful appellant: *Dunnington v. Elston*, 101 Ind. 373; *Debell v. Foxworthy*, 9 B. Mon. 228; *Clark v. Farrow*, 10 B. Mon. 446, 52 Am. Dec. 552; *Clarey v. Marshall*, 4 Dana, 95; *Martin v. Kennedy*, 83 Ky. 335; *Cook v. French*, 96 Mich. 525, 56 N. W. 101; *Lord v. Hawkins*, 39 Minn. 73, 38 N. W. 689; *Smith v. Burns*, 72 Miss. 966, 18 South. 483; *Harle v. Langdon*, 60 Tex. 555. These views, we must admit, have not met with universal acceptance. In truth, the weight of authority is probably in conflict with them and in favor of the proposition that an appeal, and especially a writ of error, must be regarded as a new proceeding which cannot prejudice the purchaser's rights which have come into being prior to its institution, and hence that one who purchases before such institution is not a purchaser pendente lite and does not acquire title subject to the hazard of its loss in the event of the reversal of the judgment or decree in favor of his vendor: *Cheever v. Minton*, 12 Colo. 557, 13 Am. St. Rep. 253, 21 Pac. 710; *Stout v. Gully*, 13 Colo. 604, 22 Pac. 954; *Horner v. Zimmerman*, 45 Ill. 14; *Wadhams v. Gay*, 73 Ill. 415; *Hannas v. Hannas*, 110 Ill. 53; *McCormick v. McClure*, 6 Blackf. 466, 39 Am. Dec. 441; *Macklin v. Schmidt*, 104 Mo. 361, 16 S. W. 241; *Parker v. Courtney*, 28 Neb. 605, 26 Am. St. Rep. 360, 44 N. W. 863; *Ludlow v. Kidd*, 3 Ohio, 541; *Lessee of Taylor v. Boyd*, 3 Ohio, 337, 17 Am. Dec. 603; *Woolbridge v. Boyd*, 13 Lea, 151. So, it has been held that if a decision is rendered on appeal, in reliance on which a sale of property is effected, the subsequent granting of a rehearing, followed by a decision adverse to that first pronounced, does not impair the title of the purchaser: *Montanye v. Wallahan*, 84 Ill. 355.

b. Respondent or Appellee.—When judgment has been entered for the possession of property, real or personal, and has been enforced by a writ, or, in obedience to the judgment, the defendant has permitted the plaintiff to take possession, the reversal or vacating of the judgment or any other proceeding by which its force is destroyed or suspended, at the election of the appellant, deprives the plaintiff of his right to retain possession, and he and all persons claiming under him, subject to the limitations as to third persons referred to in the preceding subdivision, become charged with the duty of surrendering such possession, and will be compelled to do so by the issuing of a writ of restitution: *Runyon v. Hale*, 10 Ark. 476; *Fish v. Toner*, 40 Minn. 211, 41 N. W. 972; *Hall v. Wells*, 54 Miss. 289. During the period in which the defendants are dispossessed, other persons may enter upon the possession of the property, in addition to those placed in possession under the judgment. If these persons are in privity with those so placed in possession, no doubt restitution will be awarded against them. But instead of being in such privity, they may have entered under adverse claim of title. Nevertheless, it has been held that they must be dispossessed, because

"the court cannot, without putting them out, undo its own wrong"; *Quan Wo Chung v. Laumeister*, 83 Cal. 384, 17 Am. St. Rep. 261, 23 Pac. 320.

VII. Restitution After the Reversal of a Judgment Where Property has been Transferred Under It.

a. **Where a Stranger Purchased at the Sale.**—If a judgment or decree has been entered which the party in whose favor it is is entitled to enforce by a sale of the property, and he proceeds to such sale under process, whose issuance is authorized by law and which is not subsequently set aside, public policy and the interests of the defendant alike require that the public shall not be discouraged from purchasing at the sale. Otherwise the bidding will generally be limited to the plaintiff in the writ and the property exposed to sacrifice for an inadequate price, unless it should happen that the sale is subsequently set at naught by the reversal of the judgment. Hence, the general rule, respecting the existence of which we believe there is no dissent, that a purchaser at an execution or judicial sale will not be affected by the subsequent reversal of the judgment, unless for want of jurisdiction over the subject matter or over the party whose title was sought to be divested by the sale: *Pitfield v. Gazzam*, 2 Ala. 325; *Marks v. Cowles*, 61 Ala. 299; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 267; *Feaster v. Fleming*, 56 Ill. 457; *Hobson v. Ewan*, 62 Ill. 146; *Whitman v. Fisher*, 74 Ill. 147; *Hauschild v. Stafford*, 27 Iowa, 301; *Hubbard v. Ogden*, 22 Kan. 671; *Porter v. Robinson*, 3 A. K. Marsh. 253, 13 Am. Dec. 153; *Frost v. McLeod*, 19 La. Ann. 69; *Taylor v. Lanier*, 26 La. Ann. 307; *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591; *Dorsey v. Hampson*, 37 Md. 64, 11 Am. Rep. 528; *Lenderking v. Rosenthal*, 63 Md. 28; *Garritee v. Popplein*, 73 Md. 322, 20 Atl. 1070; *Gott v. Powell*, 41 Mo. 416; *Lindell R. E. Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368; *Jenkins v. State*, 60 Neb. 205, 82 N. W. 622; *Hier v. Anheuser-Busch B. Assn.*, 60 Neb. 320, 83 N. W. 77; *Little v. Bunce*, 7 N. H. 485, 28 Am. Dec. 363; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Woodcock v. Bennett*, 1 Cow. 711, 13 Am. Dec. 568; *Perry v. Tupper*, 70 N. C. 538, 71 N. C. 385; *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455; *Lytle v. Lytle*, 94 N. C. 522; *Micou v. Davis*, 16 Lea, 257; *Frederick v. Cox*, 47 W. Va. 14, 34 S. E. 958; *Calvert v. Ash*, 47 W. Va. 480, 35 S. E. 887; *Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570; *Jessup v. City Bank*, 15 Wis. 604, 82 Am. Dec. 703; *Corwithe v. State Bank*, 18 Wis. 560, 86 Am. Dec. 793; *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. Rep. 129; *Freeman on Executions*, sec. 345. As plaintiff is entitled to enforce his judgment or decree, whether an appeal is contemplated or not, and also during the pendency of an appeal or writ of error, unless a bond having the effect of staying execution has been given, the rights of a third person purchasing must, upon principle, not be subject to impairment by notice to him that the

judgment is claimed to be erroneous and will be appealed from (*Irwin v. Jeffers*, 3 Ohio St. 389), or that such an appeal is pending: *Phillips v. Benson*, 85 Ala. 416, 5 South. 78; *Kramer v. Wellendorf*, 129 Pa. St. 547, 18 Atl. 525. In Kentucky, however, it has been held that where a judgment sustaining an attachment has been reversed, a purchaser during the pendency of the appeal must restore the property to one who had purchased from the defendant in the attachment after the levy of that writ (*Spicer v. Seale*, 106 Ky. 246, 50 S. W. 47), but if this decision can be reconciled with subsequent decisions in the same state, it is only upon the ground that he who purchased the property after the levy of the attachment was not a party to the suit, had no right to appeal from the judgment, and it, as against him, must be regarded as void if it has been reversed because the appellate court found that no debt existed upon which the attachment could be maintained: *Blake v. Wolf*, 23 Ky. Law Rep. 1143, 64 S. W. 910.

The code of Iowa declares that "property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal." The courts of that state have determined that a purchaser who has not paid the entire amount of his bid is not a purchaser in good faith, and therefore, not entitled to the benefit of this provision: *O'Brien v. Harrison*, 59 Iowa, 686, 12 N. W. 256, 13 N. W. 764. In a few of the states, the right of a purchaser, though not a party to the action, may be destroyed by an appeal, unless he is a purchaser without notice of the errors or irregularities on account of which the reversal is directed: *Winter-son v. Hitchings*, 9 Misc. Rep. 322, 30 N. Y. Supp. 260; *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742; *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. 561. If it is not the decree or judgment under which the sale is made that is reversed, but only the order confirming the sale, the purchaser's title fails, because it is dependent on the order of confirmation, and this order has been held not to fall within the policy of the decisions and statutes protecting purchasers at judicial sales from the consequences of subsequent reversals: *Sinnott v. Cralle*, 4 W. Va. 600; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Central T. Co. v. Hubinger*, 87 Fed. 3.

b. Where the Plaintiff Purchased at the Sale.—The courts of Kentucky, in defiance of the decisions elsewhere, have generally, if not universally, maintained that the plaintiff, or a party for whose benefit the judgment was held and the sale made, could purchase thereat without incurring the risk of losing his title on the reversal of the judgment: *Parker v. Anderson*, 5 T. B. Mon. 455; *Gossom v. Donaldson*, 18 B. Mon. 230, 68 Am. Dec. 723; *Yocum v. Foreman*, 14 Bush, 494; *Blake v. Wolf*, 23 Ky. Law Rep. 1143, 64 S. W. 910; and these decisions were at one time approved by the late Judge Field while a member of the supreme court of the United States (*South Fork C. Co. v. Gordon*, 2 Abb. 479, 488), though he subsequently admitted that they were contrary to the weight of authority:

Galpin v. Page, 18 Wall. 350. Some of the decisions in Kentucky establish exceptions to the general rule there obtaining, if they are not absolutely irreconcilable with it. Thus, in *Miller v. Hall*, 1 Bush, 229, it appeared that real property had been sold by a commissioner under the authority of a decree by which such property, though belonging to a married woman, was adjudged to be subject to sale to pay certain debts of her husband. Part of the property was sold to one Brummal and part to the plaintiffs who transferred their bid to one Miller. Bonds for the purchase price were given. At this stage of the proceedings an appeal was taken. During the pendency of the appeal, Brummal completed his payments and a conveyance was made to him by the commissioner. Subsequently to the completion of these payments, the decree was reversed, on the ground that the property was not liable to sale for the payment of the husband's debts. Under these circumstances, it was held that the appeal operated as a notification to the court, who in such cases must be regarded as the vendor, and to the parties and purchasers that the owners insisted that the judgment was erroneous, and were taking steps to correct it, and that if, notwithstanding such notification, the court persisted in completing the sale without any objection on the part of the purchasers, they could not be regarded as bona fide purchasers without notice, and that when the judgment of sale was reversed, no judgment could longer be regarded as existing against the owners whose property was erroneously adjudged to be sold, and finally that the court should, by rule, cause a restitution of the purchase money to the purchasers and a release by them to their title under the commissioner's deeds. In *Baker v. Baker*, 87 Ky. 461, 9 S. W. 382, lands were directed to be sold which the defendant had previously conveyed. From this judgment an appeal was taken, which resulted in a reversal. During the pendency of the appeal, two tracts of land had been sold under the judgment to the plaintiff. Afterward an order or judgment was entered setting aside these sales, and an appeal therefrom was taken. Thereupon it was held that the rule sustaining a sale of property to the plaintiff must be restricted to those cases in which it belonged to the defendant, the alleged debtor to the plaintiff, and that no consideration of public policy justified courts "in holding purchases of property belonging to another than the judgment debtor as valid when the judgment has been reversed and the plaintiff and purchaser finally adjudged to be the debtor instead of the creditor."

Except in Kentucky, the party in whose favor a judgment is rendered must, on its reversal, make restitution of all things in his control which he has acquired thereby. If lands have been set off to a plaintiff under execution, or if he has purchased real or personal property thereunder, the defendant, on the reversal of the judgment, becomes entitled to the return of such property, and restitution thereof will, at his instance, be compelled from the purchasing plaintiff: *McDonald v. Mobile L. I. Co.*, 65 Ala. 358; *Ivie v. Stringfellow*,

52 Ala. 545, 2 South. 22; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Purser v. Cady, 120 Cal. 214, 52 Pac. 489; Russell v. Mohr-Weil L. Co., 114 Ga. 753, 40 S. E. 709; Gould v. Sternberg, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 628; Twogood v. Franklin, 27 Iowa, 239; Munson v. Plummer, 58 Iowa, 736, 13 N. W. 71; Graham v. Eagan, 15 La. Ann. 97; Gott v. Powell, 41 Mo. 417; McAusland v. Punt, 1 Neb. 211, 93 Am. Dec. 358; Mullin v. Atherton, 61 N. H. 20; Hubbell v. Broadwell, 8 Ohio, 127; Bickett v. Garner, 31 Ohio St. 28; Welcker v. Staples, 88 Tenn. 49, 17 Am. St. Rep. 869, 12 S. W. 340; Adams v. Odom, 74 Tex. 206, 15 Am. St. Rep. 827, 12 S. W. 34; Wall v. Dodge, 3 Utah, 168, 2 Pac. 206; Benney v. Clein, 15 Wash. 581, 46 Pac. 1037; Singly v. Warren, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066; Dunfee v. Childs, 45 W. Va. 155, 30 S. E. 102. The rule requiring a purchasing plaintiff, on the reversal of a judgment, to make restitution of the property purchased is based upon the assumption that he is the party beneficially interested in the judgment and sale, and is, therefore, not equitably entitled to retain possession of the property when the judgment upon which his claim is based has been abrogated by its reversal. If we may assume a case in which the plaintiff is not benefited by the judgment, as where the property is ordered to be sold to pay the supposed claim of some other party to the suit, then doubtless the nominal plaintiff must, as to such judgment, be regarded as a third person who, upon a sale to him, must be entitled to retain the property, because he received nothing under the judgment: Dunfee v. Childs, 45 W. Va. 155, 30 S. E. 102. Hence where several persons are made parties defendant upon the ground that they claim liens upon the property, and a decree for its sale is made, under which one of them purchases, he must be treated as a purchasing plaintiff and required to make restitution if he receives the chief benefits of the sale (Walpole v. Ink, 9 Ohio, 143), while, on the other hand, if he paid into court the amount of his bid, and it was distributed among other lienholders according to their priorities, he is, though a party to the suit, protected in his purchase from the subsequent reversal of the decree: McBride v. Longworth, 14 Ohio St. 349, 84 Am. Dec. 383.

c. Where the Assignee of Judgment or Other Person Beneficially Interested Purchased.—From the principle already stated that restitution must be made when the purchaser is beneficially interested in the judgment, it necessarily follows that if a judgment has been assigned and a purchase at an execution sale is made thereunder by the assignee, he stands in no more favorable position than the plaintiff would have occupied had he made such purchase before the assignment of the judgment, and hence that restitution must be made to the defendant in execution: Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Freeman on Executions, sec. 347.

d. Where the Purchase was by Plaintiff's Attorney.—Though we have elsewhere expressed our dissent from the rule (Freeman on Judgments, sec. 484), we believe it to be established by an unbroken line of authorities to the effect that if an attorney for the plaintiff or other person beneficially interested in the enforcement of the judgment purchases at the sale, he, not less than a purchasing plaintiff, must, on the reversal of the judgment, make restitution of the property acquired thereunder: *Mitchell v. Hardie*, 84 Ala. 349, 4 South. 182; *Hannibal etc. R. R. Co. v. Brown*, 43 Mo. 294; *Mullin v. Ather-ton*, 61 N. H. 20; *Simonds v. Catlin*, 2 Caines, 63; *Stroud v. Casey*, 25 Tex. 740, 78 Am. Dec. 556; *Galpin v. Page*, 85 U. S. (18 Wall.) 350. In Iowa, a statute provides that property acquired by a bona fide purchaser shall not be affected by a future reversal of the judgment. A purchase at an execution sale having been made by the attorney of the plaintiff, and the judgment being afterward reversed, the question arose whether an attorney of the plaintiff could be a bona fide purchaser within the meaning of the statute. The court held that "a purchaser of land at a sheriff's sale by the plaintiff in execution or his attorney, with actual knowledge of the pending appeal, is at the peril of the purchaser, and the party or his attorney thus buying is not, within the meaning of the statute, a bona fide purchaser": *Twogood v. Franklin*, 27 Iowa, 239.

e. Where a Purchasing Plaintiff has Transferred the Bid or the Property to Another.—Can a plaintiff purchasing at a sale under his own judgment, and, therefore, subject to the loss of his title by its reversal, transfer to another a title free from this hazard? There are, indeed, several decisions apparently putting one purchasing from the plaintiff under such circumstances, especially before an appeal has been taken or a writ of error sued out, on the same footing as if he had himself been the purchaser at the original sale: *Horner v. Zimmerman*, 45 Ill. 14; *Wadhams v. Gay*, 73 Ill. 422; *Guiteau v. Wisely*, 47 Ill. 433; *McCormack v. McClure*, 6 Blackf. 466, 39 Am. Dec. 441; *Vogler v. Montgomery*, 54 Mo. 377; *Taylor v. Boyd*, 3 Ohio, 337, 354, 17 Am. Dec. 603; *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 368; but surely, all persons are chargeable with notice of the law, and hence, of the times within which appeals may be perfected or writs of error prosecuted, and that the title held by plaintiff is subject to destruction by the reversal of the judgment on which it rests. Public policy does not require that third persons shall purchase his title, or, if they do so, that they shall acquire it free from the risks upon which he held it, and we believe the better opinion is, that any purchaser from the plaintiff necessarily receives the title subject to the conditions under which it was held by him: *Marks v. Cowles*, 61 Ala. 299; *Bryant v. Fairfield*, 51 Me. 149; *Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066. It is conceded where lands are taken under an *elegit* or extended by virtue of statutes in force in the New England states, that a purchaser from the plaintiff acquires title subject to

the reversal of the judgment. The continuance of the plaintiff's title depends upon the continuance of the judgment. Where the judgment is discontinued by its reversal, the title reverts in the defendant in execution, whether the plaintiff has in the meantime made any conveyance or not: *Bryant v. Fairfield*, 51 Me. 154; *Delano v. Wilde*, 11 Gray, 17, 71 Am. Dec. 687; *Cummings v. Noyes*, 10 Mass. 433; *Goodyere v. Ince*, Cro. Jac. 246, 2 Brownl. 208; *Ognell's Case*, Cro. Eliz. 270; *Eyre v. Woodfine*, Cro. Eliz. 278; *Sympson v. Juxon*, Cro. Jac. 699. It is conceded that one who purchases from a purchasing plaintiff after the reversal of the judgment is charged with notice of such reversal and the consequent failure of the plaintiff's title, and hence that he must make restitution of everything which he may have thus acquired from the plaintiff: *Adams v. Odom*, 74 Tex. 206, 15 Am. St. Rep. 827, 12 S. W. 34.

f. Title, Whether Remains in the Purchasing Plaintiff Until the Defendant Elects to Disaffirm the Sale.—We have said that a plaintiff purchasing property under his own judgment loses, or is at least liable to the loss of, his title by the reversal of the judgment. It is probable, however, that such loss does not result from the reversal alone, but that the defendant or person whose property has been sold has the right either to treat the sale as at an end, or, on the other hand, to confirm it and seek other redress against the plaintiff. In Iowa, the right of the plaintiff, on the reversal of his judgment, to restore the property to the defendant seems to be absolute. Hence, the latter cannot maintain an action for the value of such property or for the damages resulting from its being taken by the plaintiff, or from its deterioration in value without his fault, if he is willing to return such property to the defendant: *Munson v. Plummer*, 58 Iowa, 736, 13 N. W. 71; *Fort Madison L. Co. v. Batavian Bank*, 77 Iowa, 393, 42 N. W. 331. But perhaps the better view is, that the title is divested by a sale to the plaintiff, subject to being defeated at the will of the defendant upon or after the reversal of the judgment, and hence that the defendant, before his election to disaffirm the sale, has no interest in the property subject to execution or attachment: *Nelson v. City of Beatrice (Neb.)*, 96 N. W. 288; and, if he chooses to do so, may maintain an action against the plaintiff for restitution in money, which the plaintiff cannot defeat by his offer to surrender the property: *Reynolds v. Hosmer*, 45 Cal. 630; *Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 628; *Nelson v. City of Beatrice (Neb.)*, 96 N. W. 288.

VIII. Proceedings for Restitution upon the Reversal of a Judgment.

a. Right to Restitution is Always Implied.—No direct order for restitution need be made by the appellate court. The right to such restitution is implied, and in subsequent proceedings for its enforcement it need not be shown that, by any mandate or express order, the reversing court has directed that restitution be made: *Northwestern F. Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. Rep. 523.

b. Order for Restitution in the Appellate Court.—It is, as we have already shown, not necessary that the appellate or reversing court make any order for restitution, and proceedings therefore rarely take place in that court. It may, however, if it sees proper, direct that restitution be made, and may issue such writs as to it seem necessary for compelling respect to its judgment or order: *Hall v. Wells*, 54 Miss. 289; *Market Nat. Bank v. Pacific Nat. Bank*, 102 N. Y. 464, 7 N. E. 302; *Vroman v. Dewey*, 23 Wis. 626; *Ex parte Morris*, 9 Wall. 605. The appellate court has inherent power to direct and enforce restitution (*Hiler v. Hiler*, 35 Ohio St. 645; *Gates v. Brinkley*, 4 Lea, 710); but this power does not extend to directing restitution where the property has been taken and sold under some judgment or decree other than that which it has reversed: *Murray v. Berdell*, 38 N. Y. 480. The duty of making restitution is in no way impaired by the fact that the judgment under which money or property was received was in itself void, because beyond the jurisdiction of the court entering it. "The court, in common justice, should and does retain the power to undo what it wrongfully did by restoring the parties to their situation before the wrongful interference." Hence, an appellate court, though it reverses a judgment for want of jurisdiction in the court pronouncing it, may award restitution (*O'Reilly v. Henson* (Mo. App.), 71 S. W. 109), or such an award being implied, the lower court may, after the return to it of the proceeding, compel restitution to be made: *Northwestern F. Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. Rep. 523. Appellate courts rarely exercise their jurisdiction to compel restitution, and whether they expressly direct restitution to be made or not, usually leave to the lower court the duty of taking and authorizing such steps as may be necessary to enforce the rights of the appellant arising from the reversal: *Crawford v. Hoeft*, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870; *McFadden v. Swinerton*, 36 Or. 336, 58 Pac. 816, 62 Pac. 12; *Andrews v. Thum*, 71 Fed. 763, 18 C. C. A. 308, 33 U. S. App. 393.

c. Proceedings in the Trial Court.—While, as we have shown, the appellate court has jurisdiction both to direct and to compel restitution, it rarely exercises this authority, preferring, unless in exceptional cases, that it be exercised by the trial court after the cause has been returned to it for further proceedings: *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Grant v. Oliver*, 91 Cal. 158, 27 Pac. 596, 861; *Munson v. Plummer*, 58 Iowa, 736, 13 N. W. 17; *Gregory v. Litsey*, 9 B. Mon. 43, 48 Am. Dec. 415; *Nesbitt v. Dallam*, 7 Gill & J. 494, 512, 28 Am. Dec. 236; *Fleming v. Riddick*, 5 Gratt. 272, 50 Am. Dec. 119; *Green v. Brengle*, 84 Va. 913, 6 S. E. 603. The proceeding in the trial court was formerly by *scire facias quaere restitutionem non*, "This is still the remedy in some states where the record does not show that the money realized from a sale has been paid to the plaintiff": *Eubank v. Ralls*, 4 Leigh, 308; *Freeman on Executions*, sec. 346. At the present time, the appellant may generally proceed

in a summary manner by motion in the trial court, which thereupon has jurisdiction to order and compel restitution: *Ex parte Walter Bros.*, 89 Ala. 237, 18 Am. St. Rep. 103, 7 South. 400; *First National Bank v. Elliott*, 60 Kan. 172, 55 Pac. 880; *Horton v. State*, 63 Neb. 34, 88 N. W. 146; *Keck v. Allender*, 42 W. Va. 420, 26 S. E. 437; *New York & B. B. v. Leary*, 89 Hun, 219, 34 N. Y. Supp. 1002; *Delvin v. Hinman*, 57 N. Y. Supp. 663, 40 App. Div. 101.

d. Enforcing Restitution by Independent Actions.—There is no doubt that the remedies existing for enforcing restitution in the same action or proceeding in which the reversed judgment or decree was made are cumulative merely, and that the appellant may resort to an independent action: *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589, 30 N. E. 963. Where the plaintiff has received the proceeds of the sale, the defendant may recover in an action for money had and received: *Greene v. Stone*, 1 Har. & J. 405; *Clark v. Pinney*, 6 Cow. 297; *Maghee v. Kellogg*, 24 Wend. 32. If, however, the money, after being paid to plaintiff, is by him paid to a third person, it cannot be recovered from such person, though he was one of the plaintiff's attorneys: *Langley v. Warner*, 3 N. Y. 327. The right to recover of the plaintiff is perfect upon the reversal of the judgment. It then becomes his duty to restore everything of value taken under such judgment, without waiting for any demand on him therefor. Hence, in an action for the continued holding of the property, no demand need be alleged or proved: *Zimmerman v. Winter-set Bank*, 56 Iowa, 133, 8 N. W. 807.

e. Payment of the Reversed Judgment as a Defense to the Same Action.—The moneys realized by the enforcement of a judgment for money do not, on its reversal, operate as a payment of the cause of action out of which it arose. Neither party can successfully insist that by such payment the cause of action has become extinct, and hence that no further recovery can be had thereon: *Carpy v. Dowdell*, 131 Cal. 499, 63 Pac. 780; *Close v. Stuart*, 4 Wend. 95. The appellant may, however, insist that the amount which has thus been collected from him may be treated as an offset to the cause of action, and thus reduce the amount of the recovery to which his adversary is shown to be entitled on further trial: *Ringgold v. Randolph*, 8 Eng. (Ark.) 328; *Schoonover v. Osborne*, 117 Iowa, 427, 90 N. W. 844.

f. Restitution by an Appellant Who has Collected His Judgment.—One in whose favor a judgment is ordinarily waives his right to appeal by taking out execution or otherwise coercing payment, and if he subsequently attempts to prosecute an appeal, it will, on motion, be dismissed, but if for any cause it is not dismissed, as where the collection occurs during the pendency of the appeal and the judgment is subsequently reversed, the appellate court, on its attention being called to the facts, will withhold the remittitur, or certificate of reversal, until the appellant refunds all the moneys

which he has received under the reversed judgment: *Hall v. Hrabrowski*, 9 Ala. 278; *Phillips v. Towles*, 73 Ala. 406.

g. The Statute of Limitations Against the Enforcement of the Right to Restitution, it is said, must be regarded as commencing to run at the date of the judgment of reversal: *Crocker v. Clements*, 23 Ala. 296. Where, however, such judgment is not final at the time it is pronounced, as where the remittitur must be withheld for a specified length of time, or where, for any other reason, the judgment is not immediately available for the purpose of compelling restitution, it appears to be the more reasonable to hold that the statute of limitations cannot properly be regarded as running against the appellant until he becomes entitled to assert some right under the reversal.

h. Discretion to Refuse Restitution.—Though a judgment has been reversed, its reversal may not be conclusive of the rights of the parties or necessarily establish that, as the final result of the litigation, the appellant will be entitled to retain the property or money which his adversary had taken possession of or collected before the reversal. This is usually the case where a new trial is ordered, or the cause remanded for some further proceeding which leaves the rights of the parties still the subject of contention and adjudication. Under these circumstances, the question arises whether the court may refuse restitution for the purpose of awaiting the final result of a litigation. The language of the different opinions considering this question is not harmonious. In some, the restitution is spoken of as an absolute right which must be recognized without considering what the further result of the litigation may be: *Ex parte Walter Bros.*, 89 Ala. 237, 18 Am. St. Rep. 103, 7 South. 400; *Murray v. Berdell*, 98 N. Y. 480; and ordinarily this must be so, otherwise the court might be required to determine on motion or by an independent action what the final judgment in the action should be. We apprehend, however, that there may be cases in which, notwithstanding the reversal, it so clearly appears that the party receiving moneys under a judgment is in equity and good conscience entitled to retain them, that the court is justified in altogether denying the restitution, whether sought by motion or by action: *Duncan v. Ware*, 5 Stew. & P. 119, 24 Am. Dec. 772; *Cowdery v. London etc. Bank*, 139 Cal. 298, ante, p. 115, 73 Pac. 196; *Teasdale v. Stoller*, 133 Mo. 645, 54 Am. St. Rep. 703, 34 S. W. 873; and other cases where, though restitution must be ordered to the extent of requiring the payment of moneys into court, they may be directed to be retained there to await the final decision of the action and to be applied in satisfaction of plaintiff's claim should he recover judgment thereon: *Marvin v. Brewster I. M. Co.*, 56 N. Y. 671; *Hæbler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589, 30 N. E. 963; *Carlson v. Winterson*, 146 N. Y. 345, 40 N. E. 995; *Cushing v. Vanderbilt*, 7 Daly, 512; *Kirk v. Eaton*, 10 Serg. & R. 103. So, also, though a plaintiff purchasing at a foreclosure sale

has received the rents and profits of the mortgaged premises from the date of the sale in foreclosure, yet if, by the terms of the mortgage, they were pledged as security for the mortgage debt, the mortgagor cannot compel the refunding of such rents and profits to him, for to so compel would be to give him something to which, by the terms of the mortgage, he is not entitled as against the mortgagee: *Cowdery v. London etc. Bank*, 139 Cal. 298, ante, p. 115, 73 Pac. 196.

i. The Amount of the Recovery.—The amount of recovery to which the appellant is entitled must be determined by adopting one of two theories, concerning which the courts have not been able to agree. On the one hand, it is insisted that he who enforces a judgment, the execution of which is not stayed, cannot be regarded as a wrongdoer, though the judgment is subsequently reversed, and hence, on such reversal, his position is merely that of one who has in his hands the moneys realized from such enforcement which he is no longer entitled to retain, and that he may hence exonerate himself from liability by paying the amount which he has so received, with interest thereon from the date of the sale: *Thompson v. Reasoner*, 122 Ind. 454, 24 N. E. 223; *Bryant v. Fairfield*, 51 Me. 154; *Peck v. McLean*, 36 Minn. 228, 1 Am. St. Rep. 665, 30 N. W. 759; *Eames v. Stevens*, 26 N. H. 117; *Trow v. Messer*, 32 N. H. 361; *Gay v. Smith*, 38 N. H. 171; *Lewis v. Chicago etc. Ry. Co.*, 97 Wis. 368, 72 N. W. 976; *Goodyere v. Ince*, Cro. Jac. 246. In other states, the appellant is not restricted in his recovery to the amount received by his adversary, but may sustain an action for all the damages which he may have suffered from the sale: *Reynolds v. Hosmer*, 45 Cal. 616; *Hayes v. Cassell*, 70 Ill. 669; *Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 623; *Smith v. Zent*, 83 Ind. 76, 43 Am. Rep. 61; *Maynard v. May*, 16 Ky. Law Rep. 690, 25 S. W. 879; *Fush v. Eagan*, 48 La. Ann. 60, 19 South. 108. In two of the cases cited as sustaining a recovery for the actual damages suffered by the sale, it had been made to the plaintiff, and the defendant, instead of seeking to recover the property, had elected to maintain an action for the damages accruing to him from the sale: *Reynolds v. Hosmer*, 45 Cal. 616; *Hayes v. Cassell*, 70 Ill. 669; and it may be that the measure of damages differs in actions of this character from those in which it appears that the property has been sold to a stranger to the suit, for, as when the property has been sold to the plaintiff, the defendant, after reversal, may sue for and recover it in specie, there seems to be no special hardship in permitting him to recover the damages resulting from the sale, if he elects to affirm it, because these damages must ordinarily be the value of the property, with, perhaps, interest added, from the date of the sale.

In California, however, the code seems to have modified the common-law rule, and made the decisions hereinbefore cited inapplicable to controversies arising after its enactment. This code now provides that when a judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost

by the erroneous judgment or order, so far as restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon it, on the appeal from which the proceedings were not stayed, "and for relief in such cases, the appellant may have an action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale": Cal. Code Civ. Proc., sec. 957. This section apparently restricts, in this state, the recovery of the appellant to the proceeds of the sale, less the expenses thereof.

Where restitution is made by the return to the appellant of property, the possession of which has been taken from him under a judgment by sale or otherwise, he is further entitled to recover the rents of such property during the time that he was deprived of its possession: *Schoonover v. Osborne*, 117 Iowa, 427, 90 N. W. 844; *Murray v. Berdell*, 98 N. Y. 480; and doubtless any other damages which he may have suffered through injury to such property by acts of waste committed thereon. If lands are sold in partition and the moneys deposited with a trust company, appellant, on the reversal of the judgment, may recover the difference between the amount earned by such moneys while thus deposited and legal interest: *Platt v. Withington*, 25 Abb. N. C. 103, 11 N. Y. Supp. 824, 19 Civ. Proc. Rep. 387.

NIELSEN v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

[139 Cal. 332, 73 Pac. 168.]

INSURANCE, LIFE—Guaranty, Application of to Keep Policy Alive.—The guaranty fund provided for in a renewable term policy of life insurance without re-examination must be construed the same as a reserve fund in an ordinary life insurance policy, within the meaning of the New York statute. The spirit of the statute requires a broad meaning to be given to it for the benefit of the insured. (p. 150.)

INSURANCE.—The Statute of New York must be Considered as a Part of a Contract of Life Insurance when the policy is issued by a corporation organized under its laws. (p. 151.)

INSURANCE, LIFE—Agreement or Application, When not Required to Keep Policy in Force.—When a policy of life insurance stipulates that the reserve shall be applied as shall have been agreed in the application, either to continue the insurance or purchase a paid-up policy, and neither the application nor the policy contains any agreement with reference to the application of the reserve, the assured must, nevertheless, be given the benefit of the reserve, or surplus, by having it applied upon an extension or a reinsurance, instead of having it returned to him, and on his death, without any application or agreement on his part, the right to recover the insur-

ance cannot be successfully resisted on the ground that he did not exercise his option of having the reserve applied for the purpose of keeping the policy in force. (p. 151.)

INSURANCE, LIFE—Demand and Surrender of Policy for the Purpose of Having the Reserve Applied to Continue the Insurance.—Under a statute providing that the reserve on a policy shall, on demand, with a surrender of the policy within six months after a lapse, be taken as a single premium of life insurance, and be applied to continue the reserve or to purchase paid-up insurance on the same life, it is not necessary that the demand and surrender be made before the death of the assured. The demand may be made after his death by the beneficiary. (p. 151.)

INSURANCE, LIFE—Waiver of the Surrender of the Policy.—Conceding that the beneficiary of a life insurance policy should have offered to surrender it as a condition precedent to having the reserve applied in continuation of the policy, such condition is waived if the insurer, immediately after the death of the insured, denies and disclaims all liability under and by virtue of the policy, and informs the beneficiary that it will not pay the amount named in the policy, or any part thereof. (p. 152.)

Lloyd & Wood, Bishop & Wheeler, Bishop, Wheeler & Hoefler and J. F. Bowie, for the appellant.

Van Ness & Redman, for the respondent.

333 *VAN DYKE, J.* Action to recover two thousand five hundred dollars upon a policy of life insurance. The case was tried with a jury, and a verdict rendered for plaintiff for the amount claimed. Judgment was accordingly entered, and from the judgment and order denying a new trial the defendant appeals.

On January 21, 1893, the defendant, in consideration of a premium of forty-three dollars and seventy cents, issued its policy of insurance by which it promised to pay Mathilda Nielsen, wife of John Nielsen, two thousand five hundred dollars, within sixty days after proof of the death of John Nielsen, provided such death should occur **334** on or before the twenty-first day of January, 1894. The policy contained the following clauses and conditions: "And the said society further agrees to renew and extend this insurance upon like conditions, without medical re-examination, during each successive year of the life of the insured from date hereof, upon the payment, on or before the twenty-first day of January in each such year, of the renewal premiums, in accordance with the schedule rates, less the dividends awarded hereon. Failure to pay any premium or semi-annual or quarterly installment thereof when due will thereupon terminate this policy. After deducting the expense charge, which is limited to four dollars per annum on each thousand dollars insured,

the society agrees to divide the residue of each renewal premium received by it upon this policy as follows: Such amount as shall be required for this policy's share of death losses will be appropriated as a death fund, to be used solely in settlement of death claims. The remainder thereof will be retained as a guaranty fund. The amounts so retained on account of this policy will be used toward offsetting any increase in the premium on this policy from year to year; or provided this policy, after full five years' premiums have been paid, be terminated solely by non-payment of any stipulated premium when due, eighty per cent of any amount so retained, but not so used, will be applied to extend this insurance, or, if application be made therefor while this policy is in full force and effect, to purchase paid-up insurance." The policy was continued in force by the payment of the premiums when due until January 21, 1896, at which time the premium, although due, was not paid. John Nielsen died February 19, 1896. The complaint contains three counts upon which the plaintiff relies. In the first, the payment of the premiums in due time, and the full performance of the contract on the part of the deceased during his lifetime are alleged; in the second, the failure of the defendant to give the notice required by the laws of New York of the time the premium would be due; in the third, that the policy carried a reserve in amount sufficient to protect it from forfeiture between the date when the premiums became due and the death of Nielsen.

The plaintiff argues in support of the third count that, under ³³⁵ the laws of New York, there was a sum exceeding five dollars in the reserve fund which belonged to the deceased, and this amount was more than sufficient to purchase temporary insurance from January 21, 1896, up to the date of death. The statute of New York claimed to be applicable is as follows: "Whenever any policy of life insurance hereafter issued by any company organized or incorporated under the laws of this state after being in force three full years, shall, by its terms, lapse, or become forfeited, for the nonpayment of any premium or of any note given for a premium, or loan made in cash on the policy as security, or of any interest on such note or loan, unless the provisions of this act are specifically waived in the application and notice of such waiver written or printed in red ink on the margin of the face of the policy when issued, the reserve on such policy, including dividend additions calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality, and

with interest at the rate of four and one-half per cent per annum, after deducting any indebtedness of the insured on account of any semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing, shall, on demand made, with surrender of the policy within six months after such lapse, be taken as a single premium of life insurance at the published rates of the company at the time the policy was issued, and shall be applied as shall have been agreed in the application and policy, either to continue the insurance of the policy in force at its full amount, so long as such single premium will purchase temporary insurance for that amount at the age of the insured at the time of the lapse; or to purchase, upon the same life, at the same age, paid-up insurance, payable at the same time and under the same conditions, except as to payment of premiums, as the original policy." It will be observed that the statute is, in many respects, similar to section 450 of our Civil Code.

There is no serious contention that there was not on January 21, 1896, in the hands of the insurance company, the amount of five dollars and ten cents in excess of the expense charges and death losses which had not been used by the company toward offsetting any increase in the premium, and which properly belonged ³³⁶ to the insured. The contention that there was no reserve on the policy is not based on the fact that this money was not on hand, but on the theory that, technically, it was not a "reserve" fund within the meaning of the New York statute. This amount, if properly applicable to that purpose, was sufficient to extend the insurance from the date above given beyond the date of the death of the insured.

Appellant contends, however, that it is a misnomer to call this amount a reserve. The cost of insurance for any year is the actual sum which will reimburse the insurer for its outlay, including death claims and operating expenses. Any excess in the premium over this sum is a fund held by the insurer for the benefit of the insured in certain contingencies. If the policy is for the whole period of life, and having a yearly premium, the excess thus paid in the earlier years of the policy is used to apply on the cost of insurance of the later years, thus reducing the premium and lightening the burden of keeping up the insurance as age advances. If the policy is for life, and requires yearly payments for a certain number of years, the effect is the same; the excess of the first years is applied to reduce later premiums. If, as in this case, there is

an unqualified agreement to insure for one year only, accompanied by an additional agreement to renew the insurance from year to year without re-examination, on the payment of a fixed annual or semi-annual premium, and the further agreement that the excess of such premiums over operating expenses and the insured's share of death losses shall constitute a guaranty fund to apply in reduction of, or as an offset to, later premiums, and after five years to extend the insurance in case of lapse, if there is any excess, the effect is the same. If the policy continues, the excess is used to reduce future premiums; if it lapses, the excess is applicable to a reinsurance, or extension, the same as an ordinary reserve. The only real difference between this policy and an ordinary life policy with respect to the existence of a reserve is, that in an ordinary policy both the reserve and the premiums are calculated on estimated death losses, based on mortality tables, and this estimate is not corrected by the actual losses as they occur; whereas, under this policy, the premiums are fixed with reference to estimated death losses, and the guaranty fund, ³³⁷ which is the same as a reserve, is determined by the amount of premiums left remaining after deducting the actual death losses. It is a mere play upon words to attempt to distinguish the two by calling one a reserve and the other a guaranty fund. There is no substantial difference. The purpose and object of the statute was to prevent a forfeiture of a policy by nonpayment of premiums, when there was a fund in the hands of the insurer belonging to the insured which might be applied to extend the insurance or purchase a paid-up policy. The spirit of the statute requires a broad meaning to be given to it for the benefit of the insured. We are of the opinion that the fund on hand classed in the policy as a guaranty fund is embraced within the meaning of the words "the reserve on such policy," as used in the New York statute.

It is claimed that the New York statute has no application to policies of insurance for a single year, with an agreement for reinsurance at a fixed rate, as in this case. What has been said disposes of this claim. The fact that the guaranty fund is substantially the same thing as a reserve clearly makes the statute apply to policies of the class here in question as well as to ordinary life policies. It refers by its own terms to "any policy of life insurance . . . after being in force three years," and there is nothing in its purpose or object, or in the condition of this policy as we have interpreted it, which requires

policies of this class to be excepted from the broad meaning of the words here used.

It is also clear that the statute of New York must be considered as a part of the contract of insurance and inserted for the purpose of a construction of the policy, as an additional provision, with the same effect as if it had been originally incorporated therein.

The statute in question provides that the reserve shall be applied "as shall have been agreed in the application and policy," either to continue the insurance or purchase a paid-up policy. It does not appear that either the application or the policy contains any agreement with reference to the application of this reserve. If such agreement was necessary in order to give this part of the statute effect, it would follow that, as the option given by the statute had not been exercised at the ³³⁸ time of taking the policy, the right to exercise it would be gone, and the surplus on hand at the time of the lapse would be really so much money belonging to the insured, and could not be applied either to extend the policy or purchase paid-up insurance. But we do not think the statute can be so evaded, nor is it necessary to hold that the application of this reserve, in one mode or the other, must be determined by an agreement in the policy or in the application for insurance. The statute was clearly intended to give the insured the benefit of such reserve, or surplus, by having it applied upon an extension, or a reinsurance, instead of having it returned to him.

It is not necessary that the demand and surrender of the policy referred to in the statute should be made before the death of the insured. The provision in the statute concerning a "demand made" does not expressly require that this "demand" shall come from the insured. And inasmuch as any other construction of the statute might result in a forfeiture of her rights, we will give the statute a liberal, and at the same time a not unreasonable, construction, and hold that this demand may be made by the beneficiary, the only party really interested in the policy after the death of the insured. The contract of insurance does not require any demand. The statute does not say that the demand shall be made in the lifetime of the insured, nor by the insured. It is but natural that the demand should come from the real party in interest, and the legislature could not have intended that it should come from any other source after the death of the insured. In case a choice of a paid-up policy is made, it is to be con-

sidered as a policy issued at the date of the lapse, and the same is true where the choice is for an extension of the insurance. In that case the extension is manifestly to be deemed as having been made at the time of the default, although that option to take such extension was not exercised until after the death of the insured. The principle that under such circumstances a demand may be made after the death of the insured was decided in *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y. 554, 37 Am. Rep. 594. In that case the policy provided that upon a lapse or forfeiture the company would grant a paid-up policy for such amount as the dividend would purchase, upon ³³⁹ application within one year after the default. The application was made by the beneficiary and after the death of the insured. The court says: "The fact that Vose was dead does not relieve the defendant from liability, as no such contingency by the terms of the policy is provided for as excuse for not granting a paid-up policy. The conditions were, first, that two or more annual premiums should be paid; and, second, that the application should be made within one year after default. All of this has been done, and the company were bound to comply with these conditions. Although the insured was dead, the right to a paid-up policy, or its value, remained to his assignees. If the insured had lived, he was entitled to it, and his assignees succeeded to his rights. The same rule applies as when insurance companies, or their agents, have made contracts to issue policies which have neither been made out nor delivered. In such cases the loss is payable the same as if the policy had been actually issued and delivered."

So far as the surrender of the policy is concerned, we think the conduct of the defendant was a waiver of any surrender that might have been necessary under the strict terms of the policy or of the statute which we have been considering. It is alleged in the complaint, and not denied in the answer, "that immediately subsequent to the death of said John Nielsen the defendant expressly disclaimed and denied any and all liability under or by virtue of said policy arising from the death of said John Nielsen, and informed the plaintiff that it would not pay the amount named in said policy, nor any part thereof."

It is plain from what has been said that the plaintiff was entitled to recover upon the third count of her complaint. It will therefore be unnecessary to consider the other counts of

the complaint or the appellant's objection appertaining to them. We can presume, for the sake of upholding the judgment and verdict, that they were based upon the count in the complaint which we have found to be good, and which the evidence supports, and in this view the other counts and the objections that go with them are of no further consequence.

The objections to certain instructions and evidence appertaining to the third count have been carefully examined, and, ³⁴⁰ so far as they are material, are already answered in the foregoing opinion.

The judgment and order are affirmed.

Shaw, J., Henshaw, J., and Lorigan, J., concurred.

McFarland, J., dissented.

BEATTY, C. J., Concurring. I concur in the judgment. As I construe the stipulation contained in the policy, the defendant agreed to extend it for the full amount, unless the insured prior to its lapse had elected to take a paid-up policy. The insured died after lapse of the policy for nonpayment of the premium and without having elected at any time to take a paid-up policy. The agreement to extend thereby became absolute, and to entitle the plaintiff to recover it is only necessary to read into the policy the statutory term of three years in place of the unlawful term of five years.

Rehearing denied.

If an Insured fails to pay his premiums, it has been held that the insurer is not bound without demand to apply unpaid dividends thereon: Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594.

Policies of Insurance must be construed liberally in favor of the assured, so as not to defeat without plain necessity his claim for indemnity: American Accident Co. v. Reigart, 94 Ky. 547, 42 Am. St. Rep. 374, 23 S. W. 191; Forest City Ins. Co. v. Hardesty, 182 Ill. 59, 74 Am. St. Rep. 161, 55 N. E. 139.

DAUBERT v. WESTERN MEAT COMPANY.

[139 Cal. 480, 73 Pac. 244.]

DEATH — Unborn Child — When may not Recover for, because of a Recovery by the Widow.—There can be but one action and one recovery of damages for the death of a person. If the action is maintained and a judgment recovered by his widow, his posthumous child, born after such recovery and whose existence was unknown to the defendant in the action, cannot maintain a further action on the ground that he was conceived before such former action was commenced, though the statute of the state declares that a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent death. (pp. 156, 160.)

Action by a posthumous child to recover damages for the death of her father. The right of action relied upon was created by section 377 of the Code of Civil Procedure of California, which reads as follows: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person."

William J. Herrin, for the appellant.

C. H. Wilson and Jesse W. Lilienthal, for the respondents.

481 SHAW, J. Upon a further consideration of this case, we adhere to the views expressed in the opinion heretofore rendered by Mr. Justice McFarland. That opinion was not intended to declare that at the time the judgment in favor of the widow was given she was the only possible heir of the deceased. What is there intended is, that at that time the widow was the only heir capable of maintaining an action, or known to be in existence, and the only heir in actual potential existence. The record does not sustain the contention of the appellant, made on the rehearing, that the defendant at the time knew of the existence of the plaintiff here as an unborn child.

Something more may be said on the proposition stated in the former opinion, that the statute contemplates but one cause of action for damages for the death of a person. The decisions under the Texas statute are cited as holding a different rule, but the peculiar provisions of the Texas statute account for the difference in the decisions. It provides that

an action for damages caused by the death of a person 'may be maintained by the husband, wife, child or children, "or any one of them," and that the damages awarded shall be divided among those entitled, "in such shares as the jury shall find or direct." Under this section, it was held in Texas that the statute contemplated but one cause of action: *Galveston etc. R. R. Co. v. Le Gierse*, 51 Tex. 190. Afterward, however, it was decided in that state that a previous unsuccessful attempt by a father to recover damages for the death of his wife did not bar a subsequent action by his children for 'the same damage; that although the statute intended but one action, yet where one of the persons entitled was not made ⁴⁸² a party to that action, and it was known to the defendant that there were other persons, it was the duty of the defendant to have all the parties interested made parties, or, failing to do so, that he was subject to another suit by those heirs who were not parties to the first suit: *Galveston etc. Ry. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127. And the same proposition was in substance decided in *Nelson v. Galveston etc. Ry. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. 1021. But these decisions were evidently based upon the part of the statute which required the jury to apportion the damages among the parties entitled, not by any specified rule, but in such proportions as the jury should see fit, under all the circumstances of the case. It was evidently considered from this provision that there was in some sense a several interest of the parties in the damages to be allowed under the statutory right of action. The decisions, therefore, are not applicable to our statute, which does not contain such a provision. In Kentucky the act provides that "the widow, heir, or personal representative" may sue. In that state it was held that there was but one cause of action allowed under the statute, that this action was complete at the death of the deceased, and the statute of limitations immediately began to run, if there was any person of the class to whom the right of action was given then capable of suing. Upon the point that there can be but one cause of action, the court in that case say: "Whenever a party has done an act which makes him liable in damages, and his liability is complete, and there is one in esse who can sue therefor and recover, the cause of action has certainly accrued against the defendant. But it is said that the cause of action has not accrued to the infant. There is but one cause of action. There can be but one recovery": *Louisville etc. Ry. Co. v. Sanders*, 86 Ky. 260, 5 S. W. 563. So in this state the statute gives

an action which can be maintained either by the heirs or by the personal representatives.' The recovery under this right of action has been made by a judgment in favor of the widow. The right given by the statute is therefore exhausted.

Whether the same rule would apply in a case where the other heir was in being, or where the existence of an unborn child was known to the defendant, at the time of the previous action and trial, are questions which the former opinion does not decide, and which are not intended to be here decided. ⁴⁸³ All that is here decided, or intended to be decided, is that where a child is unborn and its existence unknown to defendant at the time the judgment in favor of the widow or other heirs is given, an action cannot be maintained by the child after its birth, notwithstanding the provisions of section 29 of the Civil Code, to the effect that an unborn child is deemed to be in existence so far as necessary for its interests, in the event of its subsequent birth.

The judgment is affirmed.

Angellotti, J., Van Dyke, J., McFarland, J., Lorigan, J., and Henshaw, J., concurred.

BEATTY, C. J., Dissenting. I dissent. There are two, and only two, questions presented by this appeal, but the judgment of the superior court has been twice affirmed—first in Department, and now in Bank—without any decision of the first, and without any discussion, and even without a plain statement of the second.

The appellant, to sustain her appeal, must establish two propositions: 1. If a man's death is caused by the wrongful act or neglect of another, and he leaves surviving him a wife and living child, and the wife sues alone for the damages recoverable under section 377 of the Code of Civil Procedure, a recovery by her in that action is not a bar to another action by the child; and 2. A child conceived, but not yet born at the time of the father's death, or at the time of the judgment in favor of the mother, has in this respect the same rights as a child living at the time of the father's death.

In both the Department and Bank opinion the first of these propositions is somewhat discussed with the apparent purpose of deciding against it, but in the end that line of reasoning is abandoned and a decision of the point expressly reserved, the appeal being disposed of upon the sole ground that whatever may be the right of a living child in such case, a posthumous

child has no such right, because the latter is a part of the mother, and she is the sole heir of her deceased husband.

Neither the first nor the final opinion quotes the language of section 29 of the Civil Code or makes any attempt to show how it can be construed to mean the exact opposite of what it plainly says: "A child conceived, but not yet born, is to be ⁴⁸⁴ deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."

Why does not this plain declaration of the statute place a posthumous child upon the same footing with a living child with respect to an action under section 377 of the Code of Civil Procedure? If it would ever be necessary for the interests of a living child to prosecute a separate action after a recovery by its mother, how can it be less the interest of a posthumous child to prosecute the action? Is it again denied that a posthumous child is heir to its father? Has it less interest in the amount recoverable as compensation for the loss of family support? Is it better able than a living child to intervene in the first action? Is there some ground of estoppel against it that could not be urged against the suit of the living child? Is he participant of his mother's fraud in concealing his existence?

These and similar questions affecting the decision of the second point have been asked. Not one of them has been answered. The point is decided, but the reasons are withheld.

As to the first proposition above stated, my individual opinion is of little consequence, since its decision is reserved by the court, but its affirmance is necessary to sustain my conclusion that the judgment of the superior court should be reversed. Section 377 of the Code of Civil Procedure makes the person whose wrongful act or neglect has caused the death of an adult liable to his heirs for such damages as may be deemed just. The action may be prosecuted by the heirs of the deceased or by his administrator or executor, but in either case the measure of liability is the same—compensation to the heirs for loss of support in case of a death caused by neglect, compensation with punitive damages added in case of a malicious killing. If the recovery is by the personal representative, he, of course, holds the proceeds of the judgment in trust for the heirs. As to the rule by which such proceeds are to be divided, the law is silent. It may be that they would be treated as part of the residuary estate subject to distribution, and distributed accordingly by the probate court, or it may be that they would fall within the jurisdiction of a court of

equity, and be distributed in proportion to the needs of the respective heirs. In either case, however, each heir would ⁴⁸⁵ have a several interest in the proceeds, and his rights ought not to be barred without his fault. If, therefore, an action is brought by some of the heirs without joining the others, that is not the action which the statute provides for, and it would be dismissed upon demurrer or plea, unless the proper parties were brought in. But if the defendant failed to make the objection in either mode that there was a nonjoinder of necessary parties plaintiff, and suffered a recovery by a part of those entitled to sue, he could not resist a recovery in a subsequent action by the other heirs of their share of the damages, unless he could show that the plaintiffs in the second action were estopped by some fraud or laches on their part. In this case the present plaintiff cannot possibly have been guilty of fraud or laches in connection with the former suit, for she was not born when the judgment was given, and if there was any fault it was the fault of the defendant in failing to make the issue and exact the proof that the mother was the sole heir.

Upon these grounds I dissent from the judgment.

HENSHAW, J., Concurring. I have concurred in the foregoing, but I think it proper to express additional reasons: wherefore, in my judgment, the present action cannot be maintained. Our law contemplates that an action for a recovery in a case such as this may be brought either by the personal representative or by all the heirs. In the nature of things, where a pleading expresses the fact that the action is so brought by and on behalf of all the heirs, it is not expected that the defendant can or will controvert such an allegation, except upon the rare chance that he may happen to know of some heir unmentioned and omitted. Otherwise, he is entitled to rest without denial upon the allegation of the complaint, secure in his right to be subject to the harassment of but one action, and, should recovery be had against him, to go free from further vexation and from being mulcted a second time by payment of the amount of his judgment. Therefore, to my mind, it matters not whether the omitted heir be an unborn child or be a living person. In the case where the defendant has suffered and paid judgment, he may plead that judgment in bar to any future action, because the judgment itself could not have been given against him, excepting ⁴⁸⁶ upon the implied finding, necessarily made by the court in rendering judgment, that the action

had been prosecuted by and on behalf of all the heirs. To this the answer may well be made that, in the case of an unborn or a minor child, a fraud will have been perpetrated upon it, and this is true; but the redress for this fraud does not lie in an action against the innocent party defendant who has once paid a judgment for his tort, but it lies against the fraudulent plaintiffs, and the omitted heir must seek his redress and recovery against them. In this case the child's right lies in an action against her mother for her fraud in omitting her as an heir in the action which she brought against defendant.

BEATTY, C. J. The supplemental opinion of Justice Henshaw (which was first called to my attention after my dissenting opinion was filed) does not modify my views as there expressed. I think it only necessary to call attention to the fact that there is no ground for the assumption that in the action by the mother there was a finding expressed or implied that she was sole heir, or that in her complaint she alleged that she was sole heir. The only facts before us are the facts alleged in the complaint and confessed by the defendant's demurrer. All that is alleged is, that while plaintiff was *en ventre sa mere*, the mother recovered a judgment for the loss sustained by her, which judgment was then (at the filing of the complaint) suspended by an appeal to the supreme court, for which reason she refused to join in this action, and was therefore made a party defendant. It was also alleged that in her action the rights of this plaintiff were not considered or determined.

But suppose the fact was, as Justice Henshaw assumes, that the mother in her action alleged herself to be the sole heir, and that the defendant admitted the allegation, or that it denied it for want of information, and the court found the issue in her favor upon perjured testimony. Could her fraud and the laches or misfortune of the defendant deprive the unborn child of its right of action against the defendant and turn it over to the doubtful remedy of an action against its mother, who is possibly insolvent? If she is able to respond to such an action, she would be equally able to respond to a cross-complaint of this defendant in the present action to recover ⁴⁸⁷ from her the same damages that the plaintiff recovered against it. If either of two innocent parties is to be remitted to an action against the mother, it would be more consonant with equitable principles to select that one who was probably guilty of laches than one who could not possibly have been at fault.

The following is the opinion rendered in Department Two, June 20, 1902, which is affirmed in the opinion of the court in Bank:

McFARLAND, J. A demurrer to the complaint was sustained in the court below and judgment rendered for defendants. Plaintiff appeals from the judgment.

The demurrer was properly sustained, and the judgment is right. The complaint shows these facts: The father of appellant, Otto Daubert, was killed by the alleged negligence of the Western Meat Company, defendant. Afterward the defendant herein, Annie T. Daubert, widow of said Otto, brought an action, as his heir, against said Western Meat Company to recover damages for his death, under section 377 of the Code of Civil Procedure; and in said action she recovered a judgment, which was entered March 4, 1898, against said company for five thousand dollars, which judgment was afterward, upon appeal by the defendant therein, affirmed by this court. At the time of the death of Otto, at the time of the commencement of the said action by his widow, and at the time of the rendition and entry of the judgment therein, the present plaintiff was not in existence, being at all said times *en ventre sa mere* and a part of her mother. After the entry of the said judgment in favor of the mother, the plaintiff herein was born, and this present action was commenced in her name by her guardian to recover another judgment against the Western Meat Company for the death of said Otto. Annie T. Daubert was made a defendant herein because she refused to join with plaintiff.

The former judgment in favor of the mother is a bar to the present action. The action is statutory. The provision of said section 377 is, that "an action" may be brought either by the heirs or the personal representative of the deceased; and it has been held that—at least, as between the heirs and the personal ⁴⁸⁸ representative—"but one action is permitted": *Munro v. Pacific Coast Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303. We are not concerned here with questions which might arise where an action was brought by only one or two of several existing heirs—whether, in such case, a suit by some of the heirs would bar a subsequent suit by others, or whether the latter would be confined to their right of contribution, or what the duty of a defendant would be where it appeared from the complaint that there were other heirs not joined as plaintiff, or whether the code allows a defendant under any circumstances to be

harassed by more than one suit by an heir. In the case at bar it appears from the complaint that at the time when the widow commenced her action, and recovered judgment, she was the only heir of the deceased; and that being so, her judgment was clearly a bar to another action. There was no other heir entitled to bring the action, or be joined with her as plaintiff, and she herself had all the right given by the code to "heirs." The defendant in that action could do nothing more than defend on the merits.

It is not necessary, therefore, to follow counsel in their discussion of the question whether a posthumous child can under any circumstances recover for the death of its father, occurring before its birth, and when it was only a part of her mother and not a human being or person.

The judgment is affirmed.

Henshaw, J., and Temple, J., concurred.

The Right of a Posthumous Child to recover damages for the death of his father is not concluded, so it has been held, by a judgment in a suit brought by his mother and another beneficiary in which the amount of compensation due such child is not included nor his rights considered: *Nelson v. Galveston etc. Ry. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. 1021. See, in this connection, *Gorman v. Budlong*, 23 R. I. 169, 91 Am. St. Rep. 629, 49 Atl. 704; *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. 638.

ESTATE OF JOHNSON.

[139 Cal. 532, 73 Pac. 424.]

CONSTITUTIONAL LAW—Inheritance Taxes—Exemption of Residents of a State.—The amendment to the statute imposing inheritance taxes exempting therefrom nephews and nieces when residents of the state, is not in conflict with section 2 of article 4 of the constitution of the United States, but, by virtue of that section, the exemption must be accorded to nephews and nieces who are citizens of any of the sister states. (pp. 162, 166, 167.)

CONSTITUTIONAL LAW, Who may Raise Question.—One who does not belong to a class that might be injured by a statute cannot question its constitutionality. (p. 163.)

CONSTITUTIONAL LAW—Right of the State to Confer Privileges on Its Own Citizens.—The provision of the constitution that the citizen of each state shall be entitled to all the privileges and immunities of citizens in the several states does not prohibit a state from conferring such privileges and immunities on its own citizens as it may deem fit, but secures to the citizens of the other states the same rights, privileges and immunities. (pp. 164, 166.)

I. I. Brown, John H. Durst and Garoutte & Goodwin, for the appellants.

L. F. Byington, district attorney, and I. Harris, deputy, and J. A. Stephens, for the respondents.

533 HENSHAW, J. There are two appeals, the one taken by resident nephews and nieces, the other by nonresident nephews and nieces, citizens of sister states. Both are from the order of the court holding their respective distributive portions of the estate of the deceased liable for the payment of the collateral inheritance tax under the law as it stood in 1897: Stats. 1897, p. 77. So much of section 1 of that act as is necessary to this consideration is as follows: "After the passage of this act, all property which shall pass by will, . . . other than to the use of his or her father, mother, husband, wife, lawful issue, brother, sister, *and nieces or nephews when* **534** *a resident of this state,* . . . shall be and is subject to a tax of five dollars on every one hundred dollars of the market value of such property, . . . for the use of the state, . . . provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." The original act of 1893 (Stats. 1893, p. 193) is identical with the section as amended in 1897, saving for the italicized words above quoted, which are added by the amendment.

In *Estate of Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389, this amendatory clause was held to be in violation of the provisions of section 2 of article 4 of the constitution of the United States, as well as of section 1978 of the Revised Statutes of the United States. It was concluded that the amendment was void and should be stricken from the act, leaving the inheritances of all nephews and nieces liable for the tax as they were under the original act of 1893. Upon this present appeal we are asked to give further consideration to the question and have done so, with the result that we have reached the conclusion that an erroneous construction was given to the law in the *Mahoney* case, and that an erroneous principle of constitutional interpretation was there announced.

In the *Mahoney* case the appealing nephews and nieces were not citizens of any state of the United States, but were aliens, and therefore had no right to raise the constitutional question of immunities and prerogatives pertaining solely to citizens of sister states. One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity:

Brown v. Ohio Valley Ry. Co., 79 Fed. 176; *Red River Valley etc. Co. v. Craig*, 181 U. S. 548, 21 Sup. Ct. Rep. 703; *United States v. Moriaty*, 106 Fed. 886. A court will not decide a constitutional question unless such construction is absolutely necessary; and in the *Mahoney* case, since the appellants were aliens, and claimed no protective rights as citizens, no constitutional question was involved. It would have been sufficient in disposing of their appeal to have said, as was said by the federal court in the case last cited: "When a nonresident of the states assails the constitutionality of a statute upon the ground that it denies to him a privilege granted to the citizens of this state, it will be time enough to consider ⁵³⁵ the constitutional question suggested. Courts will not listen to those who are not aggrieved by an invalid law." As the supreme court of the United States has said in *Chicago Ry. Co. v. Wellman*, 143 U. S. 399, 12 Sup. Ct. Rep. 400: "But exercise of the power to declare the statute unconstitutional and void is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy between individuals." Still further, as hereinafter will be shown, the decision in the *Mahoney* case rested upon illegal assumptions of both appellants and respondent, and was therefore invited error. The appellants' first contention was, as expressed by the commissioner in the opinion in the *Mahoney* case: "That legacies to nephews and nieces are exempt from the collateral inheritance tax, whether they reside in this state or not." This contention was a claim that section 2 of article 4 of the constitution of the United States secured not merely to citizens of other states the immunities and privileges granted by a state to its own citizens, but secured the same to aliens, to residents of territories, and to citizens of the United States who are not citizens of any state, none of which classes comes under the protecting shield of the constitution. The appellants' second contention in the *Mahoney* case was, that the court should strike out from the amendment the clause "when a resident of the state," upon the assumption that because it favored citizens of the state it was violative of the constitution of the United States, and therefore void. This assumption was admitted by respondents and accepted in the opinion, respondents contending merely that the clause "when a resident of the state" was inseparable from the amendment, and the court must strike out the whole amendatory clause—namely, "and nephews and nieces when a resident of the state"—and the opinion adopted the lat-

ter view, which was perfectly sound, upon the assumption that the exemption of resident nephews and nieces was in and of itself unconstitutional. But that such privilege or benefit conferred by a state upon its own citizens, as expressed by this law, was not unconstitutional, we think is demonstrable upon principle as well as upon all adjudications.

Section 2 of article 4 of the constitution of the United States declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." In this there is no striking down of or limitation upon the right of a state to confer such immunities and privileges upon its own citizens as it may deem fit. The clause of the constitution under consideration is protective merely, not destructive, nor yet even restrictive. Over and over again has the highest court of the United States so construed this provision. Thus in the *Slaughter-house Cases*, 16 Wall. 36, it is said: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. . . . Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction": See, also, *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. Rep. 165; *Ward v. Maryland*, 12 Wall. 418. It will be noted not only that the constitutional provision is not restrictive, but that it is neither penal or prohibitory. It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, "No citizen of any state shall be granted any immunity not granted to every citizen of every state," or had it begun its declaration by saying that "It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state," it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may

see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges, and immunities. So that, in every ⁵³⁷ state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, *ex proprio vigore*, becomes an express part of such statute. Thus it is expressed by Mr. Justice Harlan, in *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. Rep. 165: "The object of the constitutional guaranty was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances. . . . These principles have not been modified by any subsequent decision of this court." Here, then, in precise terms, and from the highest court of our land, charged with the duty of construing our governmental law, it is declared that the purpose of the constitutional guaranty is to confer and communicate all privileges which may thus be granted by a state to its own citizens, a rule of construction obviously radically different from that which would strike down an immunity granted by a state to its own citizens, because in terms such immunity had not been conferred upon citizens of all the states. It is unnecessary that a statute should so expressly provide. The constitution itself becomes a part of the law.

And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing. Thus, in Vermont, where a statute exempted certain personal property of residents, but did not so exempt the like property of nonresidents, the tax upon the latter, not the exemption upon the former, was adjudged void, so that nonresidents should enjoy the equal right of exemption: *Sprague v. Fletcher*, 69 Vt. 69, 37 Atl. 239. And in Massachusetts, where the state law required every corporation to retain and pay to the state one-fifteenth of all dividends payable to stockholders residing outside the state, the supreme court of Massachusetts in like manner adjudged the burden void, and extended the exemption to all citizens of sister states: *Oliver v. Washington Mills*, 11 Allen, 268. And by the supreme court of Alabama the section of the statute imposing a tax ⁵³⁸ upon slaves belonging to residents of other states higher than that imposed upon slaves belonging to

citizens of the state was adjudged void only as to the burden. And for further instances reference may be made to *Wiley v. Parmer*, 14 Ala. 627; *Fechheimer v. City of Louisville*, 84 Ky. 306, 2 S. W. 65; *McGuire v. Tax Collector*, 32 La. Ann. 832; *State v. Board Ins. Com.*, 37 Fla. 564, 20 South. 772; *Roby v. Smith*, 131 Ind. 342, 31 Am. St. Rep. 439, 36 N. E. 1093; *Shirk v. La Fayette*, 52 Fed. 857; *Black v. Seal*, 6 Houst. 541; *Davis v. Pierse*, 7 Minn. 13, 82 Am. Dec. 65; *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. Rep. 165. In all these cases, and in every other case, if a privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege and immunity is not for that reason declared void, but the protecting arm of the constitution is thrown around the citizens of every other state who thus are embraced within the privilege granted. The converse of the proposition is this—and it is the form in which the question has most frequently arisen—that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void. This is a most vital distinction, which is lost sight of in the *Mahoney* case. Thus the last expression of the legislative will in the amendment of 1897 was to confer an exemption upon citizens of the state of California—a particular class—nephews and nieces. It was the legislative design, clearly expressed, that their property should not be subjected to the burden of the tax, and yet by that decision upon their property is imposed a burden which the legislature not only meant should not be imposed, but from which it expressly declared that the property should be exempted. The result is the judicial creation and imposition of a burden—a tax—in forthright violation of the declared legislative intent. This a court will never do. It is for the legislature alone to impose burdens by way of taxation. It is never the province or prerogative of a court. The holding in the *Mahoney* case, striking out the amendment of 1897, imposes a special tax upon citizens of this state, not by legislative enactment, but in the teeth of the express legislative prohibition. It is a canon of construction that an act of the legislature will yield to the ⁵³⁹ constitution so far as necessary, but no further: *Scott v. Flower*, 61 Neb. 620, 85 N. W. 857. The constitutional immunity goes only to citizens of sister states, and there is a clear distinction thus recognized between citizens of the states and citizens of the United States who are not citizens of any state, as well as citizens of alien states: *Murray v. McCarty*, 2 Munf.

393. By virtue of the constitution of the United States, the immunity which the legislature by the amendment of 1897 conferred upon citizens of this state is extended to citizens of sister states, but the immunity goes no further. Citizens of territories, of the District of Columbia, and of our new possessions, as well as aliens, are not exempted, and their property is thus liable for the tax.

The case of *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988, cited in the opinion in the *Mahoney* case, is expressly in point upon this question. There the act of Georgia provided that shipmasters of all vessels bearing toward the ports of Georgia, excepting coasters of the state, etc., refusing to accept a pilot, shall be liable to pay, etc. The manifest and express design of this law was to impose a burden upon all vessels entering the ports of Georgia, excepting those owned by its citizens. It came in direct conflict with section 4237 of the Revised Statutes of the United States. That section was enacted in exercise of the commerce power of Congress, and provides that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage between vessels sailing between ports of one state and vessels sailing between ports of different states, or any discrimination, . . . and all existing regulations or provisions making any such discriminations are annulled and abrogated." Those provisions had to do wholly with the commercial relations existing between states. Section 4237 prohibited the enactment of statutes of a certain description, and provided that by their terms they must not discriminate in the particulars mentioned. Herein there was no question of conferring benefits. It was the question of imposing illegal exactions, and the supreme court of the United States declared that the effort of the state of Georgia so to do was void. Up to this point the decision could have been taken for granted. The law was plain, almost commonplace, but in the ⁵⁴⁰ argument an attempt was made to have the supreme court uphold the whole law by striking out the exception, and this it refused to do upon the ground not that they were not separable, but that in eliminating the exception a burden was imposed upon a class, when the legislature never had intended to impose it. In this sense the provisions were inseparable, and the whole section was annulled. In the case at bar we have the expression of the legislative intent to confer a certain immunity upon citizens of this state. By force of the constitution of the United States, that immunity is extended to all citizens of sister states, leaving, as

liable for the burden of the tax, the property of all other nephews and nieces, aliens and citizens of the United States, who are not citizens of any particular state.

The order is therefore reversed, with directions to the court to enter its order in conformity with the foregoing views.

Shaw, J., Angellotti, J., McFarland, J., Van Dyke, J., and Lorigan, J., concurred.

Chief Justice Beatty dissented, claiming that the Mahoney Case, 133 Cal. 180, 85 Am. St. Rep. 155, 69 Pac. 389, had been correctly decided; that the statute in question, while not unconstitutional because of any conflict with the constitution of the United States, was yet in conflict with the constitution of California, which, by section 1 of article 1, declares all men are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness; and by section 25 of article 4 prohibits the legislature from passing special or local laws in the cases there enumerated, and "in all other cases where a general law can be made applicable." He claimed that "with respect to the right of inheritance, there is no natural or intrinsic difference between residents and nonresidents who are all citizens of the United States," though there might be "an intrinsic and substantive difference between an alien and a citizen—a difference recognized as a ground of discriminating legislation by the general consensus of all nations."

The Principal Case overrules the decision in *Estate of Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389.

The Constitutionality of Inheritance Tax Laws is the subject of a monographic note to *State v. Hamlin*, 41 Am. St. Rep. 580-585. As to the necessity of the uniform operation of such laws to different persons and properties, see *State v. Bazille*, 87 Minn. 500, 92 N. W. 415, 94 Am. St. Rep. 718, and cases cited in the cross-reference note thereto.

The Constitutionality of a Statute cannot be questioned by one whose rights it does not affect: *Sullivan v. Berry*, 83 Ky. 198, 4 Am. St. Rep. 147; *County Commissioners v. State*, 24 Fla. 55, 12 Am. St. Rep. 183, 3 South. 471.

CROCKER-WOOLWORTH NATIONAL BANK v. NEVADA
BANK.

[139 Cal. 564, 73 Pac. 456.]

MISTAKE—Recovery of Money Paid by.—Where Equally Innocent Persons have dealt with one another under a mistake, the burden of loss resulting from the common error will ordinarily be left where the parties have placed it, and a recovery may be had only where, in equity and good conscience, the defendant should be called upon to refund. (p. 172.)

BANKING—Raised Check—Recovery of Money Paid upon.—Where a forgery consists in changing the body of a check so as to raise the amount, as the drawee is not charged with knowledge of the handwriting of whomsoever may have prepared the body of the check, he may, even if negligent, recover upon the ground of mistake, if his recovery would not pass the burden of the loss to an innocent payee who had changed his condition upon the faith of the payment; that is to say, where the drawee has done any act to give currency to the paper, as by acceptance, etc., on the faith of which the holder has taken, or the condition of the holder will be altered for the worse as where he received the check for collection and paid over the proceeds to his principal before receiving notice of the alteration, then the party paying is precluded from recovering by the ordinary rules of estoppel; otherwise not. (pp. 174, 175.)

NEGOTIABLE INSTRUMENTS.—An Implied Warranty of Genuineness Accompanies the Unrestricted Indorsement and transfer of any negotiable instrument. It is an assurance to the drawee of its genuineness in all respects save that of the name of the drawer alone, with which knowledge the drawee is charged. (p. 175.)

BANKING—Recovery of Money Paid upon an Altered Check. If one bank pays to another a check held by the latter for the purpose of collection, which has been altered by greatly raising its amount, and the receiving bank turns the money over to the person for whom it collects the check, it is not liable in an action for money had and received brought by the bank making such payment for the excess of the raised check over the sum for which it was originally drawn. (p. 177.)

BANKING—Check—Bank Collecting, When does not Represent Itself to be the Owner.—If a check which has been deposited in a bank by a depositor is by it placed in the clearing-house with the clearing-house stamp on its back, "Pay only through the clearing-house," where it is honored under the clearing-house rules by the payment to the clearing-house of the balance found due against the correspondent of the bank on which the check was drawn and the crediting to the other bank of the amount of the check, whereupon it paid the proceeds, or a greater part thereof, to its depositor, such action on the part of the bank which placed the check in the clearing-house does not amount to a representation that it is the owner of the check, and hence no recovery can be had, if it has paid over the proceeds of the check to its depositor, though it appears that he had altered such check so as to greatly increase its amount. (p. 180.)

BANK—When a Holder for Collection Only.—A bank with which a check has been deposited and which credits the amount.

thereof provisionally to its depositor, and which then indorses the check with the clearing-house stamp, "Pay only through the clearing-house," must be regarded as a holder for collection only, when the constitution of the clearing-house provides that "the stamp shall be for clearing-house purposes only, and shall guarantee the validity and regularity of all prior indorsements on the paper so cleared, except the indorsement of the original payee of a certificate of deposit, and it shall not be construed to supply a missing indorsement." Such indorsement does not import an undertaking that the check has not been altered, and does not make the bank receiving payment through the clearing-house liable as for money had and received for the excess of the altered check above the amount for which it was drawn, where the amount of the check has been paid over to the depositor without notice of the alteration. (p. 182.)

BANKING—Liability of Bank Presenting an Altered Check Through the Clearing-house.—A bank which presents a check to the clearing-house with the clearing-house stamp thereon, "Pay only through the clearing-house," does not warrant that the check is in all respects what it purports to be, and is not answerable for moneys received by it, on the ground that the check was altered as to the amount, if, without knowledge of such alteration, it pays such money to its principal or depositary. (p. 185.)

BANKING.—The Presentment of a Check Through the Clearing-house and Receiving Payment Thereof Carries Merely a Warranty that the bank presenting and receiving payment has no knowledge of any defects. It is, therefore, not liable for moneys received by it, though the check had been raised as to amount, if, without notice, it pays over the moneys so received to its principal or depositary, to whom the check belonged. (p. 185.)

D. M. Delmas and R. Y. Hayne, for the appellant.

Lloyd & Wood, W. S. Wood, John Garber, Garber, Creswell & Garber, Ralph C. Harrison, Garret W. McEnerney and Smith & Pringle, for the respondent.

568 HENSHAW, J. This is an action by plaintiff to recover money paid by mistake upon a raised check. The facts are, **569** that upon the ninth day of December, 1895, the Bank of Woodland, in Yolo county, California, drew its check upon the Crocker-Woolworth National Bank of San Francisco for twelve dollars, to the order of one A. H. Dean. At that time, and for some little time prior thereto, Dean was a "client" of the Nevada Bank of San Francisco, and had therein a commercial account, with one or two thousand dollars to his credit. Dean fraudulently altered the check by changing its date from December 9th to December 13th, and raising its amount from twelve dollars to twenty-two thousand dollars. On the 17th of December, 1895, he placed his name by way of general indorsement upon the back of the check and deposited it with the Nevada Bank, making out and delivering with the check the

usual deposit tag. The bank thereupon entered upon the pass-book of Dean a "provisional credit" for the amount of the fraudulent check. On the seventeenth day of December, 1895, the Nevada Bank placed its clearing-house stamp upon the back of the check and sent it to be cleared in the usual way. The clearing-house is an association of banks, acting under a regular constitution and agreement signed by all of its members. Both parties to this action are members of it. Its purpose is the adjustment of balances between the members, which is done twice on every business day. The check found its way in regular course from the clearing-house to the Crocker-Woolworth National Bank, which was the correspondent of the Bank of Woodland, and had funds of the Woodland bank on deposit, and was honored, under the clearing-house rules, by the payment over to the clearing-house of the balance found due against it, the Nevada Bank receiving the credit due to it. On the day after the payment was so made—that is, on December 18th—Dean checked out of the Nevada Bank the sum of twenty thousand dollars, leaving about two thousand dollars to the amount of the raised check still to his credit, and fled the country. He was a forger, a common criminal, and insolvent. The Crocker-Woolworth Bank did not inform its correspondent, the Bank of Woodland, of the payment of the check until the third day of January following. On the 4th of January it ascertained from the Bank of Woodland that no such check had been drawn, and consequently knew ⁵⁷⁰ that a fraud had been perpetrated. It notified the Nevada Bank, and demanded repayment of the twenty-two thousand dollars, and offered to return the raised check.

Mistake is the gravamen of this action. It is alleged in the complaint to have consisted "in the belief on the part of plaintiff that said check had been actually and in fact drawn, made, and issued by said Bank of Woodland for said sum of twenty-two thousand dollars and dated December 13, 1895, and had not been fraudulently or otherwise altered in said or any respects, and such belief in the then present existence of such facts was material to such payment, and without such belief plaintiff would not have paid said sum or any part thereof."

The cause was tried without a jury. The court made findings, some of which will hereafter be more fully considered, and gave judgment for plaintiff. Defendant's motion for a new trial was denied, and from the judgment and from the order denying its motion this appeal is taken.

So far as the defendant is concerned, it is not contended but that it acted with perfect honesty and in the utmost good faith in presenting the check, and it is not in controversy but that, upon payment by the plaintiff, the money was in turn, upon the check demand of the depositor, paid over to him. No benefit was reaped, no advantage gained by defendant in the transaction. As between the defendant and its depositor, Dean, the findings clearly establish that the bank was but the agent for collection merely, and as such did, as in law was its duty to do, pay over the money to its principal upon his demand.

This action, then, as we have said, is one for the recovery of money paid by mistake, and it is of consequence to bear in mind at the outset of this consideration the well-settled principles governing the right of recovery in such cases. The action, even when in form a legal action for money had and received, always addresses itself to the equitable consideration of the court. The governing principle is this: that where equally innocent persons have dealt with one another under a mistake, the burden of loss resulting from the common error ordinarily will be left where the parties themselves have placed it, and so a recovery can only be had where in equity ⁵⁷¹ and good conscience the defendant should be called upon to refund: *Holly v. Missionary Society*, 180 U. S. 284, 21 Sup. Ct. Rep. 395.

In *Stratton v. Rastall*, 2 Term Rep. 370, Buller, J., speaks as follows: "Of late years this court has very properly extended the action for money had and received; it is founded on principles of justice, and I do not wish to restrain it in any respect. But it must be remembered that it was extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action, the party must show that he had equity and conscience on his side, and that he could recover it in a court of equity. . . . In conscience, he only who receives the money ought to be obliged to pay it back; and a court of equity would inquire in this case whether the party had received the money, or not. Now, if a court of equity would give this plaintiff no relief, we ought not to permit him to recover in a court of law in an action founded upon equitable principles."

The same idea is expressed by Lord Mansfield, in *Moses v. Macferlan*, 2 Burr. 1012: "This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to

refund. . . . It lies for money paid by mistake or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

In *London and River Bank v. Bank of Liverpool* (1896), L. R. 1 Q. B. Div. 7, Mr. Justice Mathew says: "If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business."

⁵⁷² In *National Bank of Commerce v. National Mechanics' Assn.*, 55 N. Y. 213-216, 14 Am. Rep. 232, and note, the principle is thus stated: "It is now settled, both in England and in this state, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund."

Mr. Daniel (2 *Daniel on Negotiable Instruments*, 3d ed., sec. 1655) says: "Where the bank discovers the forgery immediately and demands restitution, offering to return the check before the holder has lost anything by regarding the matter as all right, we cannot help thinking that it should be entitled to recover back the amount. Mr. Chitty seems to have had the same opinion. And Professor Parsons has expressed it in favorable terms. And the better doctrine, as we think, is that the bank should have the right to recover, unless the circumstances of the holder had been changed so as to render it unjust."

Mr. Daniel is here speaking of the forgery of the drawer's signature. In discussing that narrower class of forgeries, such as the one at bar, where the signatures are all genuine, but the amount of the check has been increased, a kind of forgery known as "raising a check," he says, where money is paid by a bank on such a check by a mistake, the general rule is, that it may be recovered from the party to whom it was paid, as having been paid without consideration. This is undoubtedly

the "general rule," as Mr. Daniel declares, but the rule is always subject to the most important qualifications, which he points out in his next sentence: "The bank is not bound to know anything more than the drawer's signature, and in the absence of any circumstance that inflicts injury upon another party, there is no reason why the bank should not be reimbursed": 2 Daniel on Negotiable Instruments, 5th ed., sec. 1661.

And Professor Keener (Keener on Quasi Contracts, 67) says: "To say that a plaintiff can recover money paid by mistake, notwithstanding the recovery will throw a loss upon the defendant, provided the plaintiff is under no obligation ⁵⁷³ to the defendant, is to lose sight of the grounds upon which a recovery is allowed, viz., that the defendant has money which in conscience he cannot keep. It seems difficult to establish in a case where the defendant cannot be said to be more responsible for the mistake made by plaintiff than is plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake where the result of such payment is to throw loss upon the defendant which he would not have suffered had not the payment been made. The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant."

We have quoted at this great length because these principles are all-important in determining whether a recovery should be allowed or withheld from plaintiff. The application of them, however, is frequently affected by other well-settled rules of mercantile law, to which consideration must always be paid.

Thus, it is the law beyond controversy that the drawee of a negotiable instrument is chargeable with knowledge of the genuineness of the signature of the drawer, of the condition of his funds, and of the state of his credit. If the drawee pays upon the forged signature of the drawer, he cannot recover against an innocent payee, if the recovery would subject such payee to loss. Such has been the rule since *Price v. Neall*, 3 Burr. 1354, decided by Lord Mansfield in 1762.

Again, where, as in the present case, the forgery consists in changing the body of the check so as to raise the amount, as the drawee is not charged with knowledge of the handwriting of whomsoever may have prepared the body of the check, he may, even if negligent, recover upon the ground of mistake, provided that his recovery would not pass the burden of loss over to an innocent payee, who had changed his condition upon

faith of the payment. That is to say, where the drawee has done any act to give currency to the paper, as by acceptance, etc., on the faith of which the holder has taken, or the condition of the holder will be altered for the worse in any way, as where he received the check for collection and paid over the proceeds to the principal before he received notice ⁵⁷⁴ of the alteration, then the party paying is precluded from recovering by the ordinary rules of estoppel; otherwise not.

Still further an implied warranty of genuineness accompanies the unrestricted indorsement and transfer of any negotiable instrument. It is an assurance to the drawee of its genuineness in all respects saving that of the name of the drawer alone, with which knowledge the drawee is charged: Chitty on Bills, ed. 1845, p. 245; Jones v. Ryde, 5 Taunt. 488; Wilkins v. Johnson, 3 Barn. & C. 428; Herrick v. Whitney, 15 John. 240; Story on Bills of Exchange, secs. 110, 235. This warranty of a general indorsement is declared in our state by section 3116 of the Civil Code.

An examination of the cases will show that in all well-considered adjudications, recognition, tacit or express, is given to these principles. Their ultimate analysis amounts to this: that plaintiff, even if negligent, may recover if his act has not changed the position of an innocent defendant to his detriment. Therefore, where defendant has become the owner of the instrument uninfluenced by any act of the plaintiff, or where by general indorsement defendant has warranted the instrument, and has estopped himself from denying ownership and genuineness, plaintiff may have recovery. Thus in *Bank of Commerce v. Union Bank*, 3 N. Y. 230, a raised check was presented by defendant bank bearing its general indorsement and a recovery was allowed. It was there argued that notwithstanding the defendant bank was in fact merely a collecting agent, its general indorsement was a warranty of genuineness. In *Marine National Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305, a check, genuine as to the drawer's signature, but forged as to the payee's name, and raised as to the amount, was presented to D. & Co., gold brokers, in payment for some purchased gold. They sent the check to plaintiff bank, the drawee, where it was certified. D. & Co. then paid it into the defendant bank, which accepted it. The defendant bank in turn presented it to plaintiff bank, where it was paid. Upon the same day the plaintiff discovered the alterations, and gave notice to the defendant, with the demand that it refund. Throughout the ac-

tion the defendant was treated as the owner of the check. Its defense in support of its refusal ⁵⁷⁵ of payment was based upon the certification by the plaintiff bank of the check after it had been raised, and the decision of the court was largely addressed to this matter, it being held that the certification went no further than to the genuineness of the drawer's signature, and to the amount of his funds or credit. In *Third National Bank v. Allen*, 59 Mo. 310, plaintiffs were private bankers, and bought a raised check from a stranger. They presented it to plaintiff, the drawee, and it was paid. Upon prompt discovery of the forgery and notification to the defendants, a recovery was allowed. Here the defendants were the owners of the check, and had purchased it upon their private account, and plaintiff, not having in any way induced the defendants to change their position, was entitled to a recovery. *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102, was almost precisely the case of *Marine National Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305, the defense turning merely on the declaration of the bank that the check was good. The defendant was the owner of the raised instrument. In *Espy v. Bank of Cincinnati*, 18 Wall. 604, a raised check, offered in payment for bonds and gold purchased, had been sent to the bank for information, and the teller of the bank replied that it was good. The principle is there announced that where money is paid on a raised check by mistake, neither party being in fault, the general rule is, that it may be recovered back as paid without consideration; but if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss. And it was held that the declaration of the bank's teller that it was good referred only to the genuineness of the drawer's signature and to the condition of his account. The case most nearly analogous to the one at bar is that of *National Bank of Commerce v. National Mechanics' Banking Assn.*, 55 N. Y. 211, 14 Am. Rep. 232, and note. The genuine check of a depositor in the plaintiff's bank, drawn to one Greenleaf, was taken to the bank and there certified. After certification it was fraudulently raised by Greenleaf from fifty-six dollars and seventy-five cents to fifteen thousand dollars, and was deposited by Greenleaf with the defendant. Greenleaf was a client of defendant, and made other deposits upon that ⁵⁷⁶ date, amounting, with the raised check, to twenty thousand dollars. Upon the same day, he drew out in money substantially all of his deposits, including the amount of the raised check. Upon the next day the plaintiff bank paid the

defendant bank the amount of the raised check, through the clearing-house. Upon discovery of the fraud the action was brought. It is pointed out that the defendant bank had paid the money upon the raised check to its fraudulent depositor, and thus had become the owner of it, and that it had done this uninfluenced by any act of the plaintiff bank. The court says:

"On general principles, mere negligence in making the mistake is not, as has been already shown, sufficient to preclude the party making it from demanding its correction. Such negligence does not give to the party receiving the payment the right to retain what was not his due, unless he has been misled and prejudiced by the mistake. If his loss had been incurred and become complete before the payment, he should not, in justice, be permitted to avail himself of the mistake of the other party to shift the loss upon the latter. . . . If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, then, clearly, to the extent of the loss thus sustained, the plaintiff should be responsible. But it appears that all the money which Greenleaf, the fraudulent depositor, obtained from the Mechanics' Banking Association, on the credit of the altered check, was paid out on the 16th of February, the day before the check was presented to the plaintiff. . . . The recognition of this check by the plaintiff, on the 17th of February, could not have had any influence upon the action of the Mechanics' Banking Association in paying Greenleaf's drafts on the 16th. The loss occasioned by those payments had been fully incurred by the Mechanics' Banking Association before the plaintiff had made the mistake which it seeks in this action to have corrected."

The facts in the case at bar, summarized, amount to this: by the affirmative error of plaintiff, money was paid to defendant, ⁵⁷⁷ who was the agent of Dean; the defendant, after receiving payment, did, as in law it was bound to do (*Svensden v. State Bank*, 64 Minn. 40, 58 Am. St. Rep. 522, 65 N. W. 1086), pay the money to its principal upon his demand, and thus changed its position so that, if recovery is had, the loss must inevitably be borne by it. The application of the principles above enunciated to these facts would absolutely bar a recovery, unless there be some peculiar feature of the transaction, some special act of the defendant, which takes the case out of their operation, and

which, by reason of defendant's own conduct, casts liability upon it.

The acts, facts and circumstances which by respondent are held thus to render the defendant liable, are epitomized in the following finding of the court. After making findings clearly establishing that, as between the defendant and its depositor, Dean, the bank had taken the check for purposes of collection only, the court adds: "At and before the time of making such payment, the plaintiff had no notice or knowledge whatever that the defendant was not, as it purported and represented itself to be, the absolute owner and holder of said check, and no notice or knowledge that the said check was presented by the defendant as agent for collection only, or otherwise than as owner and principal." The value and importance of this finding to support the judgment arises from the principle above stated, that if one be, or hold himself out as the owner of such paper, then a recovery may be had against him, if it be seasonably sought, because he will be the holder of money paid, which in good conscience and equity he should not be allowed to retain; whereas, in the case of a known agent, recourse is limited to the principal. Of course, the all-governing rule being that the defendant holds money which in good conscience he is not entitled to retain, it can matter not whether (if in fact he was an agent) this agency be known or unknown to the drawee, provided only that the drawee did not part with the money upon the faith of the apparent principalship. In one case, it might be that the money was paid because of the belief of the drawee that the holder and presenter of the paper was the actual and responsible owner of it. In another case, it might be paid ⁵⁷⁸ with total indifference to this fact. In the one instance, therefore, the plaintiff would have a right to rely for a recovery upon the ownership, real or apparent, of the person presenting the bill or check, while in the other, since the payment was in no wise made upon faith or reliance in the apparent state of facts, the defense that the payee was in truth but an agent, and had parted with the money to his principal, should be permitted to avail.

In this case, the finding of the court, as above quoted, is, that the defendant "purported and represented itself to be the absolute owner of said check," and that plaintiff "had no notice nor knowledge that the check was presented by the defendant otherwise than as owner and as principal."

The only support which this finding receives comes from the uncontradicted facts touching the method of the presentation and

payment of the check. It already has been stated that the check was presented in regular manner through the clearing-house, of which institution both plaintiff and defendant were members. The constitution and rules of the clearing-house, which were strictly followed by defendant, here become important for consideration. Section 2 of article 15 and sections 1, 2, and 3 of article 17 of the constitution are as follows:

Article 15: "Sec. 2. Errors in the exchanges and claims arising from the return of checks, or from any other cause, are not to be adjusted through the clearing-house, but directly between the members who are the parties to them; all checks, drafts, notes, or other items in the exchanges, found not good, or missent, shall be returned without intentional mutilation or notice of dishonor given directly to the member from whom they were received, as soon as examined, or presented not later than two hours on ordinary days, or three hours on collection day, from the hour set for the clearance in which said returned vouchers were exchanged, and the said member shall immediately refund to the bank returning the same the amount for which it had received credit through the clearing-house for the said checks, drafts, notes or other items so returned to it; in case of the refusal or inability of any member to promptly refund to the bank presenting such checks, drafts, or other items so returned, the bank holding ⁵⁷⁹ them may report to the manager of the clearing-house the amount of the same, and it shall be the manager's duty, with the approval of the clearing-house committee, to take from the settling sheet of both members the amount of such checks, drafts, or other items so reported, and to readjust the clearing-house statement, and declare the correct balances in conformity with the changes so made, provided that such report of default shall be given to the manager before the hour set for payment by him of the credit balances resulting from that day's exchanges."

Article 17: "Section 1. All negotiable paper originally made payable to the order of any bank in this association and deposited for clearance, shall be officially indorsed in writing by such original payee.

"Sec. 2. All negotiable paper deposited for clearance by the members of this association shall bear the stamp of the depositing bank, which shall clearly indicate the name of the bank, its clearing-house number, and the date of clearance. The stamp shall be for clearing-house purposes only, and shall guarantee the validity and regularity of all prior indorsements on the

paper so cleared, except the indorsement of an original payee of a certificate of deposit, and it shall not be construed to supply a missing indorsement.

"Sec. 3. Each bank shall file with every other member of this association a certified impression of its clearing-house stamp and certification-stamp, and the signatures of persons authorized to certify and indorse checks."

The check in question bore the defendant's clearing-house stamp in these words: "Pay only through clearing-house. Dec. 17th, 1895. 16. The Nevada Bank of San Francisco." With this stamp upon its back, it was passed with other checks into the clearing-house and paid by plaintiff. Admittedly, the only representation of ownership of any kind whatsoever to support this finding is contained in this stamped indorsement, coupled with the presentation through the clearing-house. The plaintiff does not even plead that the defendant was the "owner" of the check, but pleads merely that he was the "holder." The distinction is, or may be, important. One may be the holder of a check, and not the owner, and under the rule which construes a pleading most strongly against the ⁵⁸⁰ pleader, it might well be held upon the very averment of the complaint that plaintiff knew that defendant was not the owner. "The term 'holder' is properly applied to the person having possession of the paper and making the demand, whether in his own right or as an agent for another": *Bowling v. Harrison*, 6 How. 258. "Holder" is a word of the same import as 'bearer': *Putnam v. Crymes*, 1 McMull. 9, 36 Am. Dec. 250.* "Holder" is a general word applied to anyone in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it": *Byles on Bills*, *2. Moreover, it may be noted that there is no averment in the complaint that the plaintiff paid upon the belief that defendant was such owner, but the explicit statement is, that it paid in the belief that the check was genuine, and not fraudulently altered, "and without such belief plaintiff would not have paid such sum or any part thereof."

But, passing this, as being at least persuasive against the finding of the court that the defendant represented itself to be the owner, and that plaintiff paid only upon that representation, we come to consider the effect of the stamped indorsement which the Nevada Bank placed upon the check. Indorsements are either general or restrictive, and the effect of a general indorsement is well established in mercantile law. The indorser warrants to every subsequent holder thereof not liable to him that the

paper is in all respects what it purports to be, that he has good title to it, that the signatures of all prior parties are binding upon them, and that if the instrument be dishonored, he will, unless himself exonerated, pay upon due notice given: Civ. Code, sec. 3116. A special indorsement is one which specifies the indorsee, and "may, by express words to that purpose, but not otherwise, be so made as to render the instrument not negotiable": Civ. Code, secs. 3113, 3115. But while this is the ordinary effect of a general indorsement in the commercial world, it is perfectly competent for banks associated together to bind themselves by rules governing, as between themselves, the effect of their indorsements, and these rules, as to them, will supplant the law. It will be noted in the sections of the constitution of the clearing-house above quoted that all negotiable paper originally made ⁵⁸¹ payable to the order of any bank belonging to the association, and deposited for clearance, shall be officially indorsed in writing by such original payee, while all other negotiable paper deposited for clearance by members of the association shall bear merely "the stamp of the depositing bank, which shall clearly indicate the name of the bank, its clearing-house number, and the date of clearance. The stamp shall be for clearing-house purposes only, and shall guarantee the validity and regularity of all prior indorsements on the paper so cleared, except the indorsement of an original payee of a certificate of deposit, and it shall not be construed to supply a missing indorsement." Here, then, is an express limitation of the effect of such indorsement as this check bore. It eliminates, amongst other things, from the warranty of indorsement the code provision that the instrument "is in all respects what it purports to be." In short, it would seem as though the framers of the constitution of the clearing-house with deliberation followed the decision of this court in *Redington v. Woods*, 45 Cal. 428, 13 Am. Rep. 190, where it is said: "But the indorsement of the holder receiving payment can have, at most, no greater legal significance than this. It implies, at best, only an undertaking that he has a valid title to the bill or check, and consequently a right to receive payment—an implication which the law raises without the indorsement. But the indorsement, proprio vigore, imposes upon him no other or greater liability to refund money paid upon an altered check than would attach to him without the indorsement. In other words, the indorsement does not, of itself, import an undertaking that the check has not been altered; and in proceedings to recover back the amount paid on an altered check

the indorsement could not be made the foundation of the action, as importing a promise to refund the money in case it should afterward appear that the amount in the body of the check had been fraudulently altered."

The members of the clearing-house, by their constitution, have brought themselves strictly within this language from the Redington case. Moreover, it is at once apparent that under the constitution of the clearing-house such an indorsement is not only limited and special, so as to destroy the ⁵⁸² negotiability of the instrument, but that the rules were designedly drawn to effect this purpose. It is provided that: "The stamp shall be for clearing-house purposes only." The indorsement itself is to the effect that the check shall be paid only through the clearing-house, which means, of course, to the clearing-house. This method of payment is established by the rules. It amounts merely to a system of setoffs and cancellations, whereby accounts are settled between members without the actual transfer of unnecessary funds. From any aspect of this indorsement, therefore, it was not sufficient to charge the defendant with being anything other than the plaintiff pleads it was—"the holder of the check"—and certainly the indorsement contained and conveyed no "representation" whatsoever to the plaintiff that the defendant claimed or asserted itself to be the owner of the check. Common knowledge and common experience inform us that in case of local checks such as this, it is the uniform, if not the well-nigh universal, practice for banks to take them from their depositors and clients for collection only. They do not "buy" them. They take them as agents. And if this common knowledge needed re-enforcement, it is abundantly furnished by the evidence of the officers of the banks testifying in this case, to the effect that if it was not the uniform practice never to buy local checks, it was certainly the general practice to take them only for purposes of collection. Therefore, so far as this check so deposited and so presented to plaintiff is concerned, the knowledge that it conveyed was at least the knowledge that in this transaction, as in thousands of others, the Nevada Bank was probably the collecting agent merely. It will not be assumed against the uniform practice of banks in this regard, and in the absence of any evidence at all upon the subject, that the plaintiff here, and in this sole and peculiar instance, put reliance upon the supposed ownership of the check by defendant. If indeed it did have such belief, then the complete answer is, that the restricted indorse-

ment did not justify nor warrant it in that belief, nor make the defendant liable because such belief was entertained.

But there is not only no evidence to support the finding that the Nevada Bank represented itself to be the owner, but there is positive evidence, in addition to that already pointed out, ⁵⁸³ to show that plaintiff bank before payment of its check knew, or at least believed, that the Nevada Bank was acting as collecting agent for Dean. This evidence is found in the testimony of Mr. Kline, plaintiff's cashier. Mr. Kline, after stating that he looked over the checks coming through the Nevada Bank, and saw and read the particular check in question, within the time allowed by the clearing-house rules for its rejection and return, testifies: "Q. What is it you did not notice at the time? A. To whom it was payable. I merely knew it was a check of some client of the Nevada Bank and presented for cash in that manner. Q. How did you know it was a client of the Nevada Bank? A. Because of its coming in the envelope of the Nevada Bank."

It is insisted, however, by respondent that the judgment in its favor is to be supported upon other grounds than that of appellant's liability as an indorser, and that the finding in question derives support from the fact that the appellant presented the check for payment. It is to be remembered that the only representations which the Nevada Bank made were those which follow in law from the mere fact of the delivery of the check to the clearing-house for clearance; but it is said that the presentation of the check was a representation of the genuineness of the signatures of the title of the presenter, and that the check was in all respects what it purported to be; in short, that the presentation with or without indorsement was a representation of everything which the law declares to be warranted by a general indorsement. In support of this proposition are cited some cases. Thus, in *Merchants' Bank v. McIntyre*, 2 Sand. 431, where the forgery was of the signature of a prior indorser, it is said: "We hold it to be a principle of universal application that where one presents a draft or check to a bank for payment, it is a representation of the genuineness of the signatures appearing upon it, and except where the drawer's signature is forged, or there is some other peculiar reason for taking the case out of the rule, the party so presenting the draft will be held responsible to the drawee for the authenticity of such signature." In *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612,

it is said: "The presentation of the bill and the demand and receipt of the money thereon, was equivalent ⁵⁸⁴ to an indorsement." In *Leather Mfg. Bank v. Merchants' Bank*, 128 U. S. 26, 9 Sup. Ct. Rep. 3, it is said: "One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money, which in equity and good conscience has never ceased to be its property." The principle upon which these cases are decided is either—1. That the presentation is the equivalent of a general indorsement under which all of these things are warranted; or 2. That the presentation upon the one hand and the reception and payment of money upon the other, amount to a sale and purchase, and, the consideration for the sale having failed, a recovery back may be had. The cases above cited bear upon the first theory. Upon the second it is sufficient to quote from the United States circuit court, where Judge Wallace says: "Upon principle, where the holder of a note presents it at the bank at which it is made payable, receives the money, and surrenders the paper, the transaction is in effect a purchase from the holder": *Riverside Bank v. First National Bank*, 74 Fed. 276.

But in the present case the application of neither of these theories will aid in the support of the finding in question. As to the first, it is clear that mere presentation will not operate to enlarge a special and restricted indorsement into the general indorsement contemplated by section 3116 of the Civil Code. It would be preposterous to say that one who had carefully restricted his liability by special indorsement should, by the mere presentation of the check, have his situation changed to that of a general indorser. The principle, therefore, is not applicable to the case of a special indorsement, and in the case of a general indorsement it is quite unnecessary in this state to invoke it, since the matter is fully covered by the section of our code above referred to. Upon the second theory, that the presentation and payment amount to a sale with warranty by the seller, whatever may be the rule as to such warranties in other states, in this state, where the warranties are those, and those only, fixed by our code, the principle is at variance with those provisions, and therefore cannot apply. Section 1764 ⁵⁸⁵ of the Civil Code provides: "Except as prescribed in this article, a mere contract

of sale or agreement to sell does not imply a warranty." Section 1774 declares: "One who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause." These code provisions were under consideration in *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98, where it is held that, if an invalid negotiable instrument, such as overissued bonds, be presented for sale, both parties being equally innocent, the purchaser cannot recover back his money. The distinction, then, is, that in the other states the sale carries a warranty of genuineness; in this state the sale carries merely a warranty that the seller has no knowledge of defects. It is concluded upon this branch of the case, therefore, that the finding is without support from the evidence. It may be added that the plaintiff nowhere pleads reliance upon any representations made by defendant, but pleads merely its own belief in the genuineness of the instrument. The finding, therefore, is without the issues joined. As was said in *Goings v. White*, 33 Ind. 126: "There is no averment that the plaintiff relied upon the representations of the defendant. The want of such averment cannot be supplied by a recital of evidence which might justify a presumption that the representations were relied upon, unless such evidence be conclusive of the fact."

For the foregoing reasons the judgment and order are reversed, and the cause is remanded.

McFarland, J., Van Dyke, J., Lorigan, J., and Beatty, C. J., concurred.

Shaw, Judge, dissented. He agreed that the presentment and receipt of payment of the check did not amount to its sale or involve any warranty respecting it material to the present case, and also that the qualified indorsement made by the Nevada Bank, coupled with the rules of the clearing-house, did not import any warranty such as would be implied from an ordinary indorsement, and that the indorsement so made by such bank amounted to no more than would an oral demand for payment, but the judge insisted that the payment of the money to Dean, the forger, before notice of his fraud, did not relieve the Nevada Bank from liability, for the reason that its agency, was not known to the plaintiff. To hold that the finding of the trial court that the fact of the agency was not known to the plaintiff is not sustained by the evidence, invaded, in the opinion of Judge Shaw, the province of the trial court. Upon this

subject he said: "Possession of a check, like the possession of any other article of personal property, raises a presumption of ownership in the possessor, which it would take evidence to remove. The question whether the evidence in this case was sufficient to overcome this presumption depends on the inferences which might be drawn from circumstances which would justify either of two inconsistent conclusions. In such cases the conclusion of the trial court is final: *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319. That the decision of a trial court upon this fact is conclusive was directly decided in *National Park Bank v. Seaboard Bank*, 114 N. Y. 34, 11 Am. St. Rep. 612, 20 S. E. 632. So, also, the rule would be different if, after paying the money on the check, the delay in discovering the forgery had been due to the negligence of the plaintiff, and in the meantime the defendant had paid the money over to the principal, or otherwise so changed its position that it would be prejudiced by the plaintiff's recovery. But here the money was paid to Dean on the following day, and it is not claimed that any ordinary diligence by the plaintiff would have enabled it to discover the forgery in time to have prevented such payment.

"One who presents for payment a check upon a bank, by the mere act of presentation, even if no word be spoken, represents that the check so presented is all that on its face it purports to be. The defendant, therefore, did make a false representation to the plaintiff of a material fact, although it was ignorant of the falsity of the tacit statement. The plaintiff was bound to know the state of its account with the drawer of the check, and the genuineness of the drawer's signature, but it was charged with no duty to detect the forged alteration in the amount. If there was a duty resting on either party to look to that point, it was greater upon the defendant, who dealt with the forger, than upon the plaintiff, who knew nothing of him. The plaintiff, upon its innocent mistake in assuming that the false check was genuine, and its reliance upon the implied representation of the defendant, which reliance, in the absence of anything shown to the contrary, will be presumed, paid to the defendant the full amount of the check. For the money paid it received no consideration. The case of the plaintiff rests upon the principle that one who pays money without consideration, and upon a mistake of a material fact, may recover it in an action against the person who received it. The demand for payment was in effect a rescission. Nothing of value was received, and nothing need be returned. The defendant at once became liable for the money demanded: 2 *Daniel on Negotiable Instruments*, sec. 1661, and cases cited; *Redington v. Woods*, 45 Cal. 406, 428, 13 Am. Rep. 190. There is nothing in the later provisions of the Civil Code above referred to which in the least changes or affects the rule laid down in the case last cited.

"I am of the opinion that the judgment should be affirmed."

If Money is by Mistake Paid by a Bank upon a raised or altered check, neither party being in fault, it may generally be recovered back; but if either party has been guilty of negligence by which the other is injured, the negligent party must bear the loss: See the monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 896, on the rights and remedies of the several parties when a forged check has been paid; *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 74 Am. St. Rep. 180, 55 S. E. 360. Consult, in this connection, *Tolman v. American Nat. Bank*, 22 R. I. 462, 84 Am. St. Rep. 850, 48 Atl. 480; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 83 Am. St. Rep. 286, 59 N. E. 62; *First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 65 N. E. 124, 94 Am. St. Rep. 637, and note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

SUPPLEE v. HALL.

[75 Conn. 17, 52 Atl. 407.]

FRAUDULENT CONVEYANCES.—Evidence of the fact, unexplained, that a man in failing circumstances who transfers property to secure an existing debt without new consideration, also, on the day following such transfer, substantially stripped himself of all his visible property by voluntary conveyances to his son, is admissible to show that the transfer to his creditor was made with a view to his insolvency and to defraud his other creditors. (p. 189.)

ATTORNEY AND CLIENT—Privileged Communications.—Inquiries into the confidential relation of an attorney and his client to show that the latter contemplated some conduct which might render him liable to a civil action by reason of actual or constructive fraud and for the purpose of contradicting evidence given by him, are not permissible. (p. 191.)

FRAUDULENT CONVEYANCES—Evidence.—An insolvent is a competent witness as to his knowledge of his own insolvency at the time of making a voluntary conveyance alleged to be fraudulent as to creditors. Any inference, arising from the facts that he acted in collusion with the adverse party, affects the weight, but not the admissibility, of such testimony. (p. 191.)

L. K. Gould and S. Judson, Jr., for the appellant.

G. P. Carroll and E. F. Hall, for the appellees.

¹⁹ **HAMERSLEY, J.** So far as the alleged errors are concerned, the trial before the superior court may be regarded as if had upon an action by Perry, trustee in insolvency, against Supplee, to set aside the mortgage made to him by the insolvent debtor, Hall, within sixty days before the commencement of the insolvency proceedings. We do not think any one of the errors assigned furnishes ground for a new trial.

²⁰ The only questions requiring notice are those raised by the third, fifth, and sixth assignments of error, to the consideration

of which counsel for Supplee very properly confined his brief and argument.

As to the third assignment of error, it appears that on the day following the execution of the mortgage in question, Russell L. Hall gave to his son a bill of sale of all his interest in the stock of goods in his store and also conveyed to him certain land; that these conveyances were voluntary and without consideration, and that the deeds of land covered the equities in the land mortgaged to Supplee, and all of the other real estate in this state belonging to said Russell L. Hall, excepting one piece which he had transferred to another person to secure an outstanding debt.

The trustee offered these transfers in evidence. Counsel for Supplee objected on the ground that they were acts subsequent to the mortgage. The court admitted the evidence as tending to show what said Hall's intention was on December 8th with reference to the mortgage transaction.

There is no error in this. The fact, unexplained, that a man in failing circumstances who transfers property to secure an existing debt without new consideration, also, on the day following that transfer, substantially strips himself of all his visible property by voluntary conveyances to his son, certainly tends to show that the transfer to his creditor was made with a view to insolvency. The possibility that such voluntary conveyances may be so explained as to destroy any apparent probative force does not make them irrelevant when unexplained. A single transfer to prefer one creditor, by a debtor hopelessly insolvent, necessarily carries some implication that it is made with a view to insolvency; a series of transfers for the same purpose, and of voluntary conveyances made within a period of one or two days, by which most of the debtor's assets are exhausted, clearly strengthens such implication as to each.

The fifth assignment of error purports to specify error in the exclusion of the testimony of the witness Carroll, in ²¹ reference to an alleged delivery to him by Russell L. Hall of certain mining stock.

The court has made no finding of its rulings excluding such testimony, except as they may be gathered from a statement of what took place in court (apparently an excerpt from the stenographer's notes), containing questions put to the witness and his answers, remarks of counsel to each other and to the court, and remarks by the court to the counsel and to the witness. The only questions which the court appears to have excluded are these: 1. "Did he (Russell L. Hall) deliver to you on or about

that date (December 9th), subsequent to December 8th, mining stock?" 2. "Will you state whether on December 9th, or thereabouts, Mr. Hall delivered mining stock to you for the purpose of having the same delivered to his son?"

Hall had been used by the trustee as a witness to prove the amount and values of property owned by him when he executed the mortgage of December 8th, and in cross-examination by counsel for Supplee had testified that he owned on that day mining stock which he had omitted to mention on his direct examination; that he could not remember the name of the company or the number of shares of this stock which he then held, and that he did not know and had never inquired whether these shares were still in Mr. Carroll's possession or not, but that he did not think they were.

Supplee's counsel claimed that such delivery to Carroll was without consideration, and thereupon called Carroll as a witness in rebuttal. The witness was first asked if Hall had delivered and transferred to him certain mining stock owned by Hall, and the witness replied that so far as the transfer was concerned he had not received any transfer of any stock. He was then asked the question: "Did he deliver to you mining stock?" He declined to answer, because "any information I have on that matter, any papers I may have, I received in a professional capacity."

The question was claimed for the purpose of showing that in this manner Hall secreted property from his creditors. ²² The court found that any paper the witness may have received was received in his professional capacity while as counsel advising his client, and said that inquiries as to what took place between them as counsel and client, whether acts or declarations, should not be permitted. The question was further insisted upon, because Hall had testified that he had handed the stock to Carroll for the purpose of paying certain of his creditors, and that Carroll's answer would affect the credibility of Hall by showing that statement of his to be false; but the court declined to allow this to be done through testimony of Mr. Hall's attorney, as to what took place between himself and his client on the occasion named, and held that what so took place should be treated as a privileged matter. Thereupon the court sustained the objection to the question, and exception was duly taken.

There is no error in this. There seems to have been some unnecessary misunderstanding between counsel as to the meaning of the question put. If it were a mere inquiry of Carroll,

whether he had in his possession, at the time mentioned, certificates of stock belonging to Hall, it might well have been admitted; but its exclusion, if that were its meaning, did not injure Supplee, unless involving the exclusion of further inquiries. We think this was fairly involved, and that the ruling of the court excluded inquiries of the witness as to information which came to him through inspection of papers left with him by Hall, and declarations made by Hall, on the ground that he received the papers and heard the declarations while engaged in professional consultation with his client. We see nothing in the circumstances disclosed by the record that justifies us in finding that the trial court erred in holding that information thus obtained is within the privilege of counsel and client.

It is true that in certain cases apparent invasions of professional confidences have been permitted, as where certain inquiries have been allowed for the purpose of identifying documents traced to the possession of counsel, or where declarations are made to counsel in respect to the commission of some intended crime; but in this case inquiries into the ²³ confidential relation of counsel and client were pressed for the purpose of proving that the client contemplated some conduct which might render him liable to a civil action by reason of actual or constructive fraud, and for the purpose of contradicting testimony that had been given by the client. The seal placed upon the consultations of counsel and client cannot be broken for such purposes: *State v. Barrows*, 52 Conn. 323, 324.

The sixth assignment does not clearly specify any particular error. Apparently the error intended to be assigned is the admission of the testimony of the insolvent, Hall, that at the time he made the transfer in question he regarded himself as being in failing circumstances. His knowledge of his own condition, as well as the fact of actual insolvency, was in issue and no testimony could well be more relevant than that of the insolvent himself. If, as claimed by Supplee's counsel, the events of the trial indicated that Hall was acting in collusion with the trustee, such inference, if reasonable, might go far toward destroying the weight of his testimony, but could not render it irrelevant.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

As to Privileged Communications between attorney and client, in general, see Herman v. Schesinger, 114 Wis. 382, 91 Am. St. Rep. 922, 90 N. W. 460; National Bank v. Delano, 177 Mass. 362, 83 Am.

St. Rep. 281, 58 N. E. 1079; Miller v. Palmer, 25 Ind. App. 357, 81 Am. St. Rep. 107, 58 N. E. 213. The admissibility of such communications in cases of fraudulent transactions is discussed in the monographic note to O'Brien v. Spalding, 66 Am. St. Rep. 238-240. An examination of this note will show that the law on this question is not entirely clear.

MEARS v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[75 Conn. 171, 52 Atl. 610.]

COMMON CARRIERS—Special Contract—Negligence.—A common carrier receiving goods for transportation under a special limitation of liability is a common carrier still, and liable for negligence. (p. 194.)

COMMON CARRIERS—Negligence—Evidence.—A shipper of goods by railroad who shows that he shipped them in good condition and they were received in bad condition makes out a prima facie case of negligence against the carrier, and if the latter relies upon a special contract limiting its liability, the burden is upon it, not only to prove the contract but also that the injury in question fell within its terms. (p. 194.)

COMMON CARRIERS—Special Contract—Connecting Carriers.—A special contract between shipper and carrier limiting the latter's liability in respect to damage by wetting is binding upon the shipper if accepted by him or his authorized agent in consideration of a reduced rate of freight, and if it purports to inure to the benefit of a connecting carrier it is effectual for that purpose. (p. 195.)

COMMON CARRIERS—Shipping Receipt—Condition of Goods.—A shipping receipt for goods received boxed and "in apparent good order, except as noted, contents and condition of contents of packages unknown," does not raise a presumption of law that the goods themselves were in good condition when delivered to the carrier, nor prevent him from proving what their actual condition was when delivered. (p. 196.)

COMMON CARRIERS—Damages—Evidence.—If a shipper sues a carrier for damage to goods while in transit, evidence that the consignee's drayman looked at the box containing the goods after its arrival, and did not complain of its condition, is admissible on behalf of the carrier to show that there was nothing wrong with its condition at that time. (p. 196.)

COMMON CARRIERS—Negligence—Evidence of care taken by a drayman of a consignee on rainy days in delivering goods is not admissible to show the care taken on fine days, nor is it admissible to show the care he actually took on any particular rainy day, to establish the negligence of a common carrier. (p. 196.)

EVIDENCE.—The Records of the Weather Bureau kept at one place are admissible as evidence to show the state of the weather at a place ten miles distant at a particular time, if the weather conditions are shown to be usually the same at both places. (p. 196.)

COMMON CARRIERS—Evidence.—Whether Conditions in a Shipping Receipt are just and reasonable may be shown by the fact that the shipper was offered two forms of receipt at different risks and rates and that he chose the one in question. (p. 196.)

G. E. Beers and H. W. Doolittle, for the appellants.

G. D. Watrous, H. G. Day and J. W. Edgerton, for the appellee.

172 BALDWIN, J. The plaintiffs employed one McDonald, in Waltham, Massachusetts, to pack and box there a piano, and to make a contract with the Boston and Maine Railroad Company **173** for its shipment to New Haven, Connecticut, at the most reasonable rate. McDonald, having packed and boxed it, delivered it to the railroad company on October 10th, taking a paper entitled a "shipping receipt," signed by the local freight agent, which described it as "1 piano, boxed," "received" "in apparent good order, except as noted (contents and condition of contents of packages unknown)." This paper contained the following provision: "It is mutually agreed, in consideration of the rate of freight to be paid for this service, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, shown or indorsed hereon (see rules and conditions on back hereof), and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable." One of the indorsed conditions was that "no carrier or party in possession" of the goods shipped should be liable for any damage thereto by wet.

On October 12th the railroad company delivered the car containing the piano to the defendant at Northampton, Massachusetts, and on the next day the defendant sent the car on to New Haven, where it arrived before October 16th. As soon as the plaintiffs were apprised of its arrival, they employed an express company to cart the piano to their house. When received by them the box was wet without and within, and the piano badly injured by water. The express company had an agent at the freight depot, who had looked at the box, while stored there, and signed a "clear" receipt for it, making no complaint as to its condition.

The plaintiffs' complaint alleged a delivery of the piano by them at Northampton to the defendant as a common carrier to be

transported to New Haven, and its injury by water while in transit, through the defendant's default. The answer denied any negligence, and set up the shipping receipt as being the contract of shipment. The reply denied the authority of McDonald to enter into any such contract.

174 The court of common pleas instructed the jury that if they found his action to have been either authorized or ratified, then the shipping receipt was a valid contract between the parties to it, which exempted the defendant from liability for damage by wet not due to its own negligence nor to that of its servants, and the plaintiffs could not recover without showing by a fair preponderance of evidence that the wetting was due to such negligence.

In this there was error. If the special contract bound the plaintiffs, the defendant was nevertheless chargeable if, having received the piano dry, it delivered it to them wet, unless it could show affirmatively that the wetting occurred without its fault. A common carrier receiving goods for transportation under a special limitation of liability is a common carrier still: *Railroad Co. v. Lockwood*, 17 Wall. 357, 376.

The condition in the shipping receipt is to be read precisely as if it provided in terms, as it did in law, that no carrier on the route should be liable for any damage by wet not due to its own negligence nor to that of its servants: *Welch v. Boston etc. R. R. Co.*, 41 Conn. 333, 342. The complaint was for a breach of a common carrier's duty. The plaintiff in such an action, who shows that his goods were damaged, need not offer proof that the defendant was negligent. There was no claim that the injury was due to the act of God or to a public enemy. The plaintiffs denied what the defendant alleged in its answer, that there were special limitations of liability. If they proved that they shipped the piano dry and received it wet, they thus made out their case, unless the defendant could both show that there were such limitations in its favor, and that the wetting fell within them. To do this, it was bound to prove that the wetting occurred without its fault, and without its servants' fault.

As the plaintiffs' position in pleading is consistent throughout there is no ground for a claim of variance, whether they were or were not bound by the terms of the shipping receipt which was set up by the defendant: *Coupland v. Housatonic R. R. Co.*, 61 Conn. 531, 540, 23 Atl. 870.

175 In view of the fact that the conditions which this receipt imposed were introduced and accepted in consideration of a less

charge for transportation than would have otherwise have been made, the court of common pleas did not err in instructing the jury that, if McDonald was authorized to assent to its terms, it bound the plaintiffs, and was a just and reasonable contract. That the defendant was not named in it, and the Boston and Maine Railroad Company might have forwarded the car over some other line, was immaterial. Whatever connecting carrier in fact received it from the first carrier was entitled to the benefit of its stipulations. Nor was there anything in the contention of the plaintiffs that the jury should have been told that this paper might have been given and received simply as a receipt, and, if so, its terms could not affect the defendant's liability. It was both a receipt and a special contract as to the conditions of transportation.

The trial court committed no error in declining to charge the jury that, should they find the piano was injured by wet while in the possession of the defendant, they might infer therefrom that it was chargeable with negligence; and, instead of this, in instructing them that the fact, if found, that such an injury so occurred, should be given such weight as they might think it fairly entitled to in connection with all the other facts and circumstances bearing upon the case. It might have been exposed to rain by the sudden act of a casual trespasser. The jury had all the evidence before them and were to consider all: *Button v. Frink*, 51 Conn. 342, 347, 50 Am. Rep. 24.

The plaintiffs' request for a charge that the shipping receipt raised a presumption that the piano was delivered at Waltham in good condition was properly refused. Being boxed, the description of the goods received "as in apparent good order, except as noted (contents and condition of contents of packages unknown)," could only have referred to the condition of the exterior of the box.

There was error in the refusal to instruct the jury that the "clear" receipt, given by the express company at New Haven, was not conclusive, and that the plaintiffs could nevertheless show by other evidence that the piano was then wet ¹⁷⁶ and damaged. Such a receipt by a consignee is a mere piece of evidence, and does not necessarily preclude him from afterward proving what was really the fact.

The defendant was properly allowed to show that Morton, the express company's agent who receipted for the piano at New Haven in behalf of the plaintiffs, looked at the box (though from a position where he could not see all its sides) when it was

pointed out to him by the defendant's delivery clerk, and made no complaint. If it was then wet, it would have been natural for one who was there to act for the plaintiffs to remark upon it, and his silence was some evidence that he observed nothing amiss in its condition, and so that there was nothing amiss to be observed.

One Woods, a piano-mover employed by Morton, carted the box to the plaintiffs' house, and testified, in behalf of the plaintiffs, that the weather was clear at the time. Evidence having been given by them that it rained later on that day, he was asked what care he took in moving pianos on rainy days, the claim being that the jury might find that it rained while the piano was in his cart. This question was properly excluded. Care taken on rainy days did not show the care taken on fine days, nor did proof of the care he generally took on rainy days legitimately tend to show the care he actually took on any particular rainy day: *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379.

Having first introduced expert testimony that the weather records kept by the United States weather bureau at any place would, as a general rule, be the true record for the surrounding country, the defendant was allowed to lay in the weather records so kept at Boston, on the day when the piano was shipped, as evidence of what the weather then was at Waltham, the place of shipment, which was ten miles distant. There was no weather bureau at Waltham, and none as near to it as that at Boston. The records were properly admitted. The objection of remoteness went simply to their weight.

The evidence introduced in defense of the negotiations between the freight agent of the Boston and Maine Railroad Company at Waltham and McDonald, leading up to his ¹⁷⁷ acceptance of the shipping receipt, was plainly relevant. It showed that he was offered the choice of two modes of shipment, one called "owner's risk," at a rate named, and the other called "shipper's risk," at a higher rate, and chose the former, to which the receipt conformed. This bore directly upon the question whether the conditions imposed by that paper were just and reasonable.

There is error, and a new trial is ordered.

In this opinion the other judges concurred.

The Limitation of Carriers' Liability by contract is considered at length in the monographic note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74-134. Such a contract may be valid,

if it does not attempt to exempt the liability of the carrier for negligence: *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279, 63 N. E. 245, 64 N. E. 647; *Richmond v. Southern Pac. Co.*, 41 Or. 54, 93 Am. St. Rep. 694, 67 Pac. 947.

A Record of the Weather, made in the performance of his duty by an officer in the signal service bureau, is evidence of the condition of the weather at the period embraced by it: *Knott v. Raleigh etc. R. R. Co.*, 98 N. C. 73, 2 Am. St. Rep. 321, 3 S. E. 735; *People v. Dow*, 64 Mich. 717, 8 Am. St. Rep. 873, 31 N. W. 597.

UPTON v. TOWN OF WINDHAM.

[75 Conn. 288, 53 Atl. 660.]

HIGHWAYS—Municipal Liability for Defects in.—If a highway is so raised above the adjoining ground as to be unsafe for travel without a sufficient railing or fence on its sides, the absence of such railing or fence is by statute a defect in the highway, and a person injured by means thereof without fault in himself, may recover just damages against a town allowing its highway to remain in that condition. (p. 198.)

HIGHWAYS—Danger—Guards.—The fright of a gentle horse at the passing of an automobile driven with ordinary care and at reasonable speed is an incident to the proper use of highway, and a danger to be guarded against by a municipality under the statute. (p. 199.)

HIGHWAYS—Liability for Defects in.—A penalty against municipalities for maintaining defective highways may be incurred when a person properly using a highway suffers a personal injury or loss of property not due to his culpable conduct nor to that of a fellow-traveler, but being the direct result of a defective condition of the highway in relation to those events naturally incident to its use, and which naturally expose the traveler to danger happening when the highway is not in a reasonably safe condition. (p. 201.)

HIGHWAYS—Proper Use of—Defects in.—The passing of an automobile driven with ordinary care and reasonable speed, and the fright and shying of a gentle horse thereat, constitute events in the proper use of the highway calling for its maintenance in a safe condition, and the injury done to a traveler by its unsafe condition in connection with such an event, is one of those dangers to which travelers are exposed by defects in the highway and for which indemnity is provided when the danger ripens into actual damage. (p. 201.)

HIGHWAYS—Liability for Defects in—Proximate Cause.—If a frightened horse plunges from a defective highway and throws the occupant of a vehicle upon the dashboard thereof, causing a concussion of his brain, and the horse, after running a distance, overturns the vehicle, by which the occupant receives further injury, both injuries are to be deemed the result of one transaction arising and resulting from the defective condition of the highway. (p. 202.)

C. E. Perkins and G. W. Maloney, for the appellant.

A. F. Eggleston, T. J. Kelley and W. A. King, for the appellee.

289 HAMERSLEY, J. The defendant, having suffered a default, notified the plaintiff that upon the hearing in damages it would offer evidence to disprove the material allegations of the complaint, viz., that the highway in question was defective; that the town had neglected its duty to repair the defect; that the injury to the plaintiff's intestate was caused by the defect; and also to prove that the injury was due to the contributory negligence of the plaintiff's intestate. The burden was on the defendant to disprove the allegations, and to prove the contributory negligence. The trial court has found that the defendant has failed to sustain this burden, and has properly **290** assessed substantial damages. There is no error unless the court, in reaching its conclusion as to the facts the defendant undertook to establish, has been influenced by an erroneous view of the law. The appeal assigns errors of this kind.

It is claimed that the court, in finding that the injury complained of was caused by a defect in the highway, misconstrued the meaning of the statute authorizing an action against the town, in that the injury, received in the manner as found by the court, did not happen through or by means of the defect in the highway, within the meaning of that statute.

It appears that the portion of the highway where Mrs. Upton (the plaintiff's intestate) was driving with her husband when the injury was received was so raised above the adjoining ground as to be unsafe for travel, and that the town had failed to maintain any railing or fence on the side of this portion of the highway. Such relation of the highway to the adjoining land, without a sufficient railing or fence on its side, is by statute a defect in the highway, and the person injured by means of such defect—that is, by want of such railing or fence—may recover just damages in an action upon the statute against the town: Gen. Stats., sec. 2672; Rev. 1902, sec. 2019.

The horse was a gentle horse and was being driven with due care. While meeting and passing an automobile it became frightened, shied, veering sharply to the right, and being within a few feet of the right side of the road, plunged down a declivity of some three or four feet to the adjoining land, ran a distance of some forty feet and then, taking another turn, overturned the carriage, whereby Mrs. Upton was thrown to the

ground. When the horse plunged down the declivity Mrs. Upton was thrown against the dashboard of the carriage and was badly injured upon her head, receiving also, by being thrown against the dashboard and thereafter upon the ground, a serious concussion of the brain. She suffered great pain, and died within two weeks after the accident from concussion of the brain caused by being thrown against the dashboard, as aforesaid, and out of the carriage upon the ²⁹¹ ground. The automobile was being driven with ordinary care and at a reasonable speed.

The defendant claims that the court erred in finding the injury to Mrs. Upton to have been caused by want of the fence or railing required by statute, because the fright of the horse was a proximate, contributing cause, and relies upon *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. Rep. 225, 43 Atl. 143, in support of this claim. The precise point decided in that case was this: "A traveler upon a highway cannot be injured through a defect in a highway, . . . when the culpable negligence of a fellow-traveler is a proximate cause of his injury" (page 697, 71 Conn., page 225, 71 Am. St. Rep., and page 147, 43 Atl.). The law thus stated does not apply to the present case, but the grounds on which the decision rests must govern the claim now made. These grounds are stated at length in the opinion, and it is sufficient to refer to them without repetition. The ratio decidendi may be stated thus: The state undertakes to provide highways for the common use, and to maintain them in a reasonably safe condition for that purpose; it sees fit to indemnify any one of the traveling public who, while using them in a proper way, may receive injuries caused by a failure to maintain the way in a reasonably safe condition; it imposes upon the town corporation the governmental duty of maintaining the highways within its limits, and provides means for the enforcement of that public duty; among these means it provides that whenever a traveler is injured through or by means of a defect in the highway, existing by reason of the town's failure to perform this public duty, the town shall pay, as a penalty for such failure, the just damages that may be awarded to the injured person, and authorizes such person to bring an action upon the statute against the town for the purpose of determining the amount of just damages and of enforcing the penalty. The penalty is not incurred unless a person is injured through or by means of a defect in the highway. This is a penal statute, and the language defining the condition upon which the penalty arises should not be extended beyond a natural meaning of the words used. An injury caused

by the culpable negligence of a third person is an actionable tort for which the injured party has his remedy. ²⁹² An injury caused by a defect in a highway is not an actionable tort. The party injured has no remedy against the town or against anyone, for any wrong done to him. His indemnity provided by the state may be collected of the town, but only as a penalty and when the occasion upon which the penalty arises exists as defined by statute. That occasion is defined thus: "Any person injured in person or property by means of a defective road" (Gen. Stats., sec. 2673; Rev. 1902, sec. 2020), having the same meaning as the language used in the original act (Law of 1672, p. 7), viz., if it so shall happen that any person shall lose a limb, etc., through or by means of the defect of any highway.

This definition of the occasion upon which the penalty may arise requires that some one has suffered a personal hurt or loss of property under circumstances that entitle him to the indemnity provided by the state for those of the traveling public who thus come to grief in reliance on the reasonably safe condition of the highway—for those who properly use it. It requires also that such hurt shall be the direct result of some defect in the highway.

The state undertakes to make the highway reasonably safe in view of its proper use, and of those events which may naturally be expected to arise as incident to that use, by the traveling public. It does not undertake to make it safe in view of culpable negligence by the traveling public, whether it be that of the person hurt or his fellow-traveler, nor to make it safe in view of every event that may possibly happen. The indemnity given by the state is provided upon consideration of the exposure of travelers and their property to dangers by the proper use of a highway, which is defective in view of events naturally connected with and incident to its use.

The meaning of the definition may, therefore, be stated affirmatively and in general terms, thus: The penalty may be incurred when a person properly using a highway suffers a personal hurt or loss of property not due to his culpable conduct nor to that of a fellow-traveler, but being the direct result of the defective condition of the highway in relation to ²⁹³ those events naturally incident to its use, and which naturally expose the traveler to danger when happening where the highway is not in a reasonably safe condition.

The facts found in the present case come within this meaning of the statute. Highways are made reasonably safe in

view of the possibility of gentle horses becoming frightened through the proper use of the way. Mrs. Upton's hurt was received as the direct result of the defective highway, and the fright of her horse was not an independent cause of her hurt but was one of those events incident to the proper use of the way. The passing of an automobile driven with ordinary care and at a reasonable speed and the fright and shying of a gentle horse constitute one of those events in the proper use of a highway calling for its maintenance in a safe condition, and the hurt which may be done to a traveler by an unsafe condition, in connection with such event, is one of those dangers to which travelers are exposed by defects in the highway, and in consideration of which the state has provided an indemnity when the danger ripens into an actual damage. So far as the statute recognizes a relation between such events and an occasion calling for the penalty imposed upon the town, it is not the relation of cause and effect between the event and the hurt received, but solely a relation between the event and the defective road, as being one of the contemplated modes whereby hurt may be received by means of the defect.

Upon the grounds on which the decision in *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. Rep. 225, 43 Atl. 143, rests, as well as upon a careful consideration of the purpose and meaning of our statute in view of the claims now made, we deem it clear that the trial court did not err in holding, upon the facts found, that Mrs. Upton was injured by means of the defective road.

The defendant complains of the court's finding, that this portion of the road was unsafe for travel without a railing or fence, and of its finding that Mrs. Upton's injury occurred by reason of the want of such railing or fence, and urges that these findings were influenced by error in not holding, as claimed by the defendant, that the fence required by statute ²⁹⁴ does not contemplate any protection against a frightened horse falling or plunging down an unguarded embankment.

We think the act contemplates some protection against any incident connected with the proper use of the road, wherever a fence is necessary to make the road reasonably safe for travel, and may include some protection against the danger of such an unguarded road in the case of a horse becoming frightened. The kind and degree of protection must depend largely upon the circumstances of each case. It does not appear that the findings of the court were controlled by an assumption that the town was bound in law to maintain a more complete and absolute pro-

tection against a horse getting off the highway than the purpose and meaning of the law justified. The conclusions of the court, that the safety of travel demanded a sufficient fence, and that the injury to Mrs. Upton was received by reason of the want of a legally sufficient fence, may be consistent with a correct understanding of the true meaning of the statute. Subject to the application of that correct understanding, these conclusions are inferences of fact. It is immaterial whether or not another court might reasonably reach different conclusions upon the evidence produced before the trial court; such conclusions cannot be reversed by this court as erroneous, unless the facts contained in the record show that the inferences which the court has drawn from them are plainly unreasonable. We cannot say that the conclusions complained of—applying to the facts found a correct interpretation of the statute—plainly violate the sound rules of reason.

The defendant claimed before the trial court that if Mrs. Upton received no injury except by being thrown out of the wagon, some forty feet from the highway and after the alleged defect had been safely passed, the defect could not, in law, have been the cause of her injury. The court found that in going down the unprotected declivity, which was the defect, Mrs. Upton was badly injured upon her head and also received a serious concussion of the brain by being thrown violently forward upon the dashboard, and therefore did not rule upon this claim of law. In argument, however, counsel ²⁹⁵ for the defendant urges that the court has further found that Mrs. Upton received a concussion of the brain by being thrown upon the ground, as well as by being thrown against the dashboard, and that the court, in addition to damages for the injuries to the head, has assessed damages for the concussion of the brain, including in the amount damages for the concussion of the brain received by being thrown upon the ground; and claims that this is error.

The concussion of the brain and the injuries upon the head were properly considered as incidents of one injury resulting from the defective road.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

When the Negligence of a Municipality in allowing a highway to remain out of repair concurs with an extraordinary outside cause in producing an injury, the municipality is not liable, but the concurrence of an ordinary outside cause with such negligence will not re-

lieve it: *Shaeffer v. Jackson Township*, 150 Pa. St. 145, 30 Am. St. Rep. 792, 24 Atl. 629; *Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, 22 N. E. 14. If a pedestrian on a sidewalk near the entrance to a bridge is suddenly confronted with a bicycle, and jumps to one side to avoid a collision, but falls down the bank, the failure of the city to maintain guards at the place is the proximate cause of the resulting injury, for which it is answerable, although a concurring cause of the injury was the unlawful act of the bicyclist in riding on a sidewalk of the bridge: *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292, 59 N. E. 347. But see *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. Rep. 225, 43 Atl. 143.

The Doctrine of Proximate Cause is the subject of a monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861.

STATE v. GALLIVAN.

[75 Conn. 326, 53 Atl. 731.]

CRIMINAL TRIALS.—Evidence in corroboration of the testimony of an accomplice is not necessarily confined to points directly connecting the accused with the crime. (p. 204.)

CRIMINAL TRIALS.—*Juries Should Consider Evidence* bearing on the question of guilt as a whole and not dissect it into unconnected fragments for separate consideration regardless of their relation to each other. (p. 205.)

CRIMINAL TRIALS—*Degree of Proof Required.*—Only the essential ingredients of the crime need be proved beyond a reasonable doubt, and a lower degree of proof may suffice as to circumstances which, while they are of importance in leading to a conclusion of guilt, are not essential to support it. (p. 205.)

CRIMINAL TRIALS—*Reasonable Doubt—Moral Certainty.*—Juries are at liberty to adopt any hypothesis as to the defendant's guilt which to their minds is established beyond a reasonable doubt, and it is not necessary to instruct them that such hypothesis must be established to a moral certainty by circumstances proved beyond a reasonable doubt, which are inconsistent with any other hypothesis. (p. 205.)

CRIMINAL TRIALS—*Reasonable Doubt—Questions for Jury.* If, besides the facts proven, beyond a reasonable doubt tending to sustain a hypothesis of defendant's guilt, there are other facts established by a preponderance of the evidence which are inconsistent with the theory of the defense, the jury may properly consider them as bearing upon the reasonableness of such theory. (p. 207.)

CRIMINAL TRIALS.—*An Hypothesis of Guilt* cannot be pronounced unreasonable in any case, which might be reasonably assumed upon a consideration of the facts in evidence, or of such facts together with inferences legitimately founded upon them. The evidence need not go directly to support it. (p. 208.)

CRIMINAL TRIALS—*Theory of Defense—Error.*—The jury has a right to pass upon the intrinsic probability of a theory of innocence presented by the defense, when applied to the facts before it, without first asking if there is any positive testimony as to the facts upon which such theory is presupposed. To instruct otherwise is reversible error. (p. 209.)

CRIMINAL TRIALS.—The Accused has the Right to claim that no crime has been proved against him, or that if any crime has been proved, it is not the one charged in the indictment, and to have the jury properly instructed as to both claims. (p. 209.)

J. L. Barbour, C. F. Thayer and J. J. Desmond, for the appellant.

S. Lucas, state's attorney, and C. W. Comstock, for the appellee.

328 BALDWIN, J. The indictment charges the defendant in one count with murder committed in the course of an attempt to rob Shumway, the murdered man, and in another with murder committed while actually robbing him. Wormsley, who was indicted with him, was a witness for the state, and testified that both he and the defendant made a murderous assault upon Shumway for the purpose of robbery, and actually robbed him of a considerable sum in bank bills before he died; that one of them, for twenty dollars, he soon afterward had changed at the store of one Sherman; and that most of the rest was taken by the defendant to hide in the cellar of his father's house. It appeared, on Wormsley's cross-examination, and by other witnesses, that he had made previous statements, some of them under oath, before the coroner, which were flatly contradictory to his present testimony, and were to the effect that the defendant had nothing to do with either the robbery or the murder. Wormsley was a colored lad of eighteen, who worked for his board on a milk farm belonging to the defendant's father, with whom the defendant also lived.

In order to corroborate the evidence which he had given, Sherman was produced as a witness by the state and testified that he had changed a twenty dollar bank bill for Wormsley soon after the murder. Evidence had been given by one Vars that Shumway had a number of twenty dollar bank bills in a bag in his inside vest pocket a few weeks before his death.

This testimony from Sherman was properly admitted. It tended, in connection with that given by Vars, to show that Wormsley, soon after the murder, had a bill in his possession of a kind similar to bills which shortly before that event had been in the possession of Shumway. It was important for the state to produce some evidence from an independent source to corroborate Wormsley, since he occupied the position of a self-confessed accomplice: *State v. Williamson*, 42 Conn. 261. Such corroboration was not necessarily to be confined to points di-

rectly connecting the defendant with the crime: *State v. Maney*, 54 Conn. 178, 192.

For similar reasons, testimony was rightly received that ³²⁹ four hundred and sixty dollars in bank bills was found in the cellar where Wormsley had testified that the defendant said he intended to conceal the fruits of the robbery.

The defendant requested the court to instruct the jury that in determining whether he was guilty they need consider only such circumstances as necessarily tended to prove his guilt; that every circumstance relied upon by the state must, as a separate issue by itself, be proved beyond a reasonable doubt, and that the circumstances so proved must establish to a moral certainty the particular hypothesis to prove which they were offered, and be inconsistent with any other hypothesis.

These instructions were properly refused. The jury were to consider the whole evidence bearing on the question of his guilt, taken together, and were not bound to dissect it into unconnected fragments for a separate microscopic examination of each, regardless of its relation to the rest. That only must, as matter of law, be proved beyond a reasonable doubt, on which the guilt of the accused essentially depends. Such proof, for instance, in this case was requisite in respect to the death of Shumway. That was an essential ingredient in the crime. A lower degree of proof might suffice as to circumstances which, while they might be of some and even of material importance in leading up to a verdict of guilty, would not be essential to support it: *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Acker v. State*, 52 N. J. L. 259, 19 Atl. 258.

Nor, in the application of evidence, could the jury be restricted by any particular hypothesis suggested by the state, as bearing on which such evidence might have been offered. They were to consider all that had been proved as bearing upon all that had been charged in the indictment, and were at liberty to adopt any hypothesis as to the defendant's guilty connection with the crime which to their minds was established beyond a reasonable doubt.

Nor was it necessary to instruct them that such hypothesis must be established to a moral certainty, by circumstances proved beyond a reasonable doubt which were inconsistent ³³⁰ with any other hypothesis. As to this, the jury were properly and sufficiently instructed that "in order to establish the guilt of the accused beyond a reasonable doubt the proof ought to exclude every reasonable presumption or hypothesis of innocence in the mind

of each juror, and all the essential elements of the crime charged ought to be established beyond a reasonable doubt." It was not necessary to exclude an unreasonable hypothesis. Nor is the phrase "moral certainty" one the use of which is likely to be of benefit to a jury. It is an artificial form of words having no precise and definite meaning. As explained in one dictionary (the Century) it signifies "a probability sufficiently strong to justify action upon it"; in another (Webster's International), the first definition given is "a very high degree of probability, although not demonstrable as a certainty." It has been also used as indicating a conclusion of the mind established beyond a reasonable doubt: *Commonwealth v. Costley*, 118 Mass. 1, 24. The nature of a reasonable doubt was fully stated to the jury by the trial judge, in a manner to which no exception has been taken.

The defendant's counsel claimed in argument that some of the circumstances which the state claimed to have proved (such as the finding of the bank bills in the cellar, and certain conduct and statements of the defendant after the murder) were consistent with a reasonable hypothesis of his innocence of the crime charged, namely, the hypothesis that Wormsley committed it alone, and then told him of it and perhaps gave him some of the money, after which Gallivan hid the money and concealed the knowledge thus acquired. They then asked the court to instruct the jury that if all the circumstances proved beyond a reasonable doubt tending to establish the defendant's guilt were in their opinion "consistent with this theory," then they were not to give them any weight as tending to establish his guilt under the indictment for murder. The court gave this instruction with the following qualification: "Except and unless the facts referred to tend to corroborate Wormsley's statement, for which purpose they cannot be discarded."

³³¹ The instruction thus given was too favorable to the accused. It gave some countenance to the claim of his counsel that the circumstances proved beyond a reasonable doubt were to be classed and considered by themselves, without any reference whatever to the existence of other circumstances as to which the evidence might be less convincing. The jury had a right to take into account, for some purposes, in coming to a final decision of the cause, any incriminating testimony which, in their opinion was probably true, though they might not deem the facts which it went to establish proved beyond a reasonable doubt. If all the facts in support of the indictment that were

proved beyond such a doubt were consistent with the hypothesis that Gallivan was only an accessory after the fact, but there were other circumstances inconsistent with that hypothesis, of the existence of which they were satisfied by a preponderance of evidence, although not beyond a reasonable doubt, they could properly consider those circumstances as bearing upon the reasonableness of the hypothesis so suggested to them, and avail themselves of whatever light they might regard them as casting upon the issue to be determined by their verdict: *State v. Rome*, 64 Conn. 329, 333, 30 Atl. 57; *Commonwealth v. Webster*, 5 Cush. 295, 313, 52 Am. Dec. 711.

In a previous part of the charge, however, the court, after calling the attention of the jury to the defendant's claim that certain specified facts and circumstances which the state had offered evidence to prove, were "explainable upon the theory that Wormsley committed the crime and told Gallivan of it, and Gallivan helped him to conceal it," had remarked as follows: "You should ask yourselves first, in considering this claim, whether it is true that such a theory would explain all or some of these circumstances, and you should ask where is the evidence that Wormsley told Gallivan of the crime he had committed and Gallivan helped him to conceal it. No one has testified to this, as I remember; and are there any facts in evidence from which reasonably you could draw inferences which would justify such a theory? Your attention has not been called specifically to any evidence justifying an inference that Wormsley told Gallivan of the crime and Gallivan ³³² helped him to conceal it, and I know of none in the evidence to which I could call your attention. But the matter is for your consideration and your determination." Afterward the instructions before quoted were given, shortly before the cause was committed to the jury, and the court then added these further observations: "I have already stated, gentleman, to you, that before you adopt such a theory you should ask yourselves whether the evidence justifies such a theory, or the facts submitted warrant such an inference—Whether the theory arises, in fact, from the evidence, or otherwise. I need not repeat what I have already said on that subject to you. It is a matter for your sound judgment and consideration."

The jury were thus told emphatically and repeatedly that, in considering this claim, it was their duty to ask where there was any evidence of the state of facts assumed by the hypothesis thus suggested, and whether such a state of facts could reason-

ably be inferred from anything that was in evidence. But the question for them was rather whether, in view of the facts which they might find to be established, such an hypothesis could be reasonably deemed an admissible one. It was not a question of their making the inference or adopting the theory. It was not a question of the existence of affirmative evidence tending to show that Gallivan knew nothing of the murder until after its commission, and then learned it from Wormsley. The jury might be of opinion that the theory thus set up by the defense had no such support and was an improbable one, and still believe that it might be reasonably entertained and was not inconsistent with any of the facts proved, although to them another—that of Gallivan's active participation in the murder—appeared the more reasonable and the right one.

An hypothesis cannot be pronounced unreasonable in any case, which might be reasonably assumed upon a consideration of facts in evidence, or of such facts together with inferences legitimately founded upon them. The evidence need not go directly to support it. In the case at bar, it was undisputed that Gallivan was in company with Wormsley shortly ³³³ after the murder, and that they went off together on an excursion to a neighboring city the same evening, returning at a late hour. There was, therefore, an opportunity for private conversation between them on the night following the crime, and they continued for some days later to reside on the same farm, taking their meals in the house in the cellar of which the money was found hidden. Under these circumstances the jury were not excluded from considering the theory that Wormsley was the sole murderer and Gallivan only an accessory, because there was no positive testimony to that effect. That a prisoner's guilt must be proved beyond all reasonable doubt has been said by high authority to be but another way of stating that every supposition, not in itself improbable, which is consistent with his innocence, ought to be negatived: 1 Stephen's History of the Criminal Law of England, 438. It was the right of the jury to pass upon the intrinsic probability of the theory suggested by the defense, when applied to the facts before them, without first asking if there were any positive testimony as to the conversation which it presupposed.

If errors are assigned and found in the conduct of a trial, it is our duty to order a new trial, unless we are convinced that they are "immaterial or such as have not injuriously affected the appellant": Gen. Stats., Rev. 1902, sec. 802.

The jury in this cause had, in the early part of a lengthy charge, been properly instructed that to justify a conviction of the accused, the proof ought to exclude every reasonable presumption or hypothesis of innocence. But this general observation was, to say the least, not more likely to impress itself upon their minds as a complete statement of the law in this respect by which they were to be guided, than the particular observations in respect to the particular hypothesis relied on by the defendant, which were made and repeated later, and very shortly before they retired to consider their verdict. Where the court, at the conclusion of a charge, returns to a subject considered in an early part of it, and gives additional instructions in regard to it, the jury may naturally regard them, so far as they may state a new and different rule, to be intended to qualify, as a last word, that which ³³⁴ had been previously said: *Ashborn v. Waterbury*, 69 Conn. 217, 219, 37 Atl. 37; *State v. Yanz*, 74 Conn. 177, 180, 92 Am. St. Rep. 205, 50 Atl. 37.

The reasons of appeal founded upon this part of the charge relate to instructions as to a claim which we do not feel justified in pronouncing immaterial. They may have led the jury to believe that the defendant could take no benefit from the hypothesis which he suggested, in the absence of affirmative evidence tending to show that what it assumed to be true was true. If this be doubtful, the doubt, in a case like this, in which a man was on trial for his life, should be resolved in favor of the accused.

The finding states that while the counsel for the defendant presented this theory to the jury in argument, it was only "as an assumption, a possible theory, and one in which he disclaimed all belief or confidence"; that he denied the existence of any guilty knowledge on the part of his client; and that he did not claim that the facts were as the theory assumed them to be, or that there was evidence that they were such.

It was the right of counsel to contend both that the accused was guiltless of any crime, and that, if guilty of any, there was at least a reasonable doubt whether it was one for which he could be convicted on the present indictment. He had requested the court in writing to instruct the jury in respect to the hypothesis on which the latter claim was based, and it remained the duty of the court to give such instructions, notwithstanding what had been said in the final argument. The instructions which were given properly qualified the instruction requested, in respect to the consideration due from the jury to facts which

might be consistent with the defendant's theory, as corroborative of Wormsley's testimony. In the added remarks as to their adoption of such a theory and the basis of evidence required for its support, there was error.

An application to rectify the record has been presented. All the points of law which the defendant desired to raise were sufficiently presented by the record as sent up.

335 The application to rectify is denied; but error is found and a new trial ordered.

Torrance, C. J., and Hall, J., concurred.

Hamersley, J., and Prentice, J., dissented.

Reasonable Doubt.—While the law requires the guilt of an accused to be established beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved, but that, on the whole evidence, the jury must be able to pronounce that guilt is proved to a moral certainty. It is not necessary to prove each link in the chain of circumstances relied on, or every fact in the case, beyond a reasonable doubt; but it is sufficient if, taking the evidence as a whole, the jury are satisfied of the defendant's guilt beyond a reasonable doubt: See the monographic note to *Burt v. State*, 48 Am. St. Rep. 568, 569; *State v. Cohen*, 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857. A charge to the jury that "unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in the indictment, you should acquit him," is correctly refused: *Smith v. State*, 133 Ala. 145, 91 Am. St. Rep. 21, 31 South. 806.

In a Criminal Trial depending upon circumstantial evidence, a jury should not be instructed to pass upon each fact separately, though absolutely essential to conviction. All the facts must be considered together in determining the main issue: *State v. Cohen*, 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857.

On the Corroboration of Accomplice Testimony, see the monographic note to *Commonwealth v. Price*, 71 Am. Dec. 671-678.

DEVINE v. WARNER.

[75 Conn. 375, 53 Atl. 782.]

SALES—Acceptance to Satisfy Statute of Frauds.—The receipt or acceptance of goods, sold under an oral contract of sale, to satisfy the statute of frauds, involves the taking possession of them by the vendee, and while there may be an acceptance and actual receipt by the vendee pursuant to the sale, unaccompanied by a manual delivery, as where the vendee is already in possession, or the vendor retains the custody as bailee of the vendee, yet the proof in such cases must be clear and unequivocal and establish an actual change of the relation of the parties to the property. (p. 214.)

SALES—Acceptance to Satisfy Statute of Frauds.—A receipt and acceptance of goods under an oral contract of sale, to satisfy the statute of frauds, implies a delivery; and there must be such a delivery by the vendor and receipt by the vendee of the goods sold, as shows an intention on the part of the parties to vest in the vendee the possession and right to possession discharged of all lien for the price. (p. 214.)

SALES—Acceptance to Satisfy Statute of Frauds.—An acceptance of goods, sold under an oral contract of sale, to satisfy the statute of frauds requires more, by way of proof of receipt and acceptance, than mere words, indicative merely of the parties' assent to the agreement of sale, and it is not enough to satisfy the condition of acceptance that the title to the goods has merely become vested in the purchaser. (p. 214.)

J. F. Addis, J. Huntington and A. D. Warner, for the appellant.

J. O'Neill, for the appellee.

376 PRENTICE, J. The plaintiff, as assignee of his brother, John J. Devine, sues to recover damages for breach of an alleged contract for the sale of a lot of tobacco in the barns of the assignor, who had raised it, and of the value of several hundred dollars. The sale is claimed to have been made on September 22, 1899, when the tobacco was upon the poles. It was then agreed between the parties that the tobacco was to be allowed to remain in the barns until cured, and when cured was to be stripped and placed in bundles weighing forty pounds to the bundle, as the defendant preferred bales **377** of that weight, and when this was done, Devine was to notify the defendant. All of this was done.

No memorandum in writing of the sale was ever made and signed by the parties or their agents; no part payment of the purchase price or payment to bind the bargain was ever made; and there never was any acceptance and receipt of the tobacco,

or any portion of it, by the defendant, the vendee, unless it resulted from the acts and occurrences of November 28th, when the defendant visited the vendor's premises and sheds where the tobacco then was lying on the floors cured, stripped and baled. These acts and occurrences, as they are claimed by the plaintiff to have been proven were, in the language of the finding, as follows:

"The defendant inspected and examined the tobacco and said to Devine, 'You have done your part well.' After inspecting said tobacco . . . the defendant said to Devine: 'I am going to load one or two cars with tobacco I have purchased here' (Suffield), and if I can take this tobacco this trip, or in one of those cars this week, I shall do so; but if I do not take it away with me this time, I want you to pile it up into one or two piles, as it will keep better than if lying in a single tier; and if I do not take it this week and the weather should get damp, open up the buildings so that the tobacco will keep in good condition.' Devine replied, 'All right, I will do as you say.' The defendant loaded two cars of tobacco bought of other parties in Suffield, and took it away with him, but did not take or send for the tobacco at Devine's. At the end of that week Devine, as the defendant had directed, placed all the tobacco in two piles, and when the weather was damp opened up the barns in order to keep the tobacco in good condition."

The plaintiff, who sues for a breach of a contract of sale and purchase, was bound to establish a valid contract. Under the circumstances of the case, this involved not only showing a meeting of minds but a compliance with the requirements of the statute of frauds. This latter involved proof of the acceptance and actual receipt of part at least of the property. A meeting of minds upon a sale is one thing; acceptance ³⁷⁸ and actual receipt of property sold are quite different things. The charge altogether fails to distinguish between them. The question of receipt and acceptance was a vital one to the defendant's case, and yet the jury were so instructed that these prerequisites to the plaintiff's recovery were largely lost sight of. The court doubtless had in mind the requirements of the statute, but it used language which plainly indicated that the test was whether the negotiations and acts of the parties were such that the title to the tobacco passed to the vendee; and its constant use of the phrase "completed transaction," without explanation of its meaning as used, was unfortunate. The instructions were addressed to laymen. The court made the mistake of assuming

a knowledge on their part of legal distinctions and definitions which is not usually found outside the legal profession, and used language, therefore, which was most likely to be misleading. The charge contains no statement of the important fact that there must have been an actual receipt of part of the goods. It is indeed said that there must have been an acceptance, but the jury are nowhere told what the law understands by acceptance. As the term is not applied in connection with delivery or receipt, the jury might well have believed that all that was required was a mental acceptance of the goods as subject matter for a bargain, and not acceptance of them as goods bought.

The language and conduct of the parties in making the contract was not kept distinct in its bearing from that claimed to evidence a receipt and acceptance in fulfillment of the contract. The general tenor of the charge was such that a layman might well have drawn the conclusion therefrom that if the parties came to a final, definite and complete agreement as to the terms of sale, that was enough. If not, the language of the court near the close of the charge must have removed all doubt from the minds of the jury. Here they were told: "If you find from all the language of the parties that there was such a meeting of the minds of the parties that the vendee considered he had bought the tobacco and the vendor that he had sold it, there was a sale of the tobacco and a constructive ³⁷⁹ delivery." These instructions were plainly erroneous. They wholly ignored the operation of the statute, and were of such a character as to be well-nigh conclusive against the defendant's contention.

In this case the custody of the property remained in the vendor. There was no outward change of possession attending or following the sale. There was no manual act of delivery of either property or symbol. The only evidence relied upon to establish a change of legal possession was that of the conduct of the vendee, which had its most distinct if not entire expression in language by which it was claimed to have been shown that the continuing custody of the vendor was no longer that of an owner, but solely that of a bailee for the vendee. The situation was, therefore, one of those delicate ones which demanded of the court clear and precise instructions. The circumstances of the case furnished no ground for a claim, and none was made, of an acceptance and receipt of a part of the tobacco. Either the whole or none had been accepted and received. The court was therefore justified in disregarding, as it did, the effect of an acceptance and receipt of a part; but it should have carefully

guided the jury to a clear understanding of the other requirements of the statute. It should have told them that there were three distinct questions which they should ask of themselves. and from the evidence answer in the affirmative, before a verdict for the plaintiff could be rendered, to wit: 1. Was there an agreement of sale and purchase? 2. Did the seller, pursuant to the agreement, part with and the buyer receive the possession and control of the tobacco? 3. Did the buyer, either before or after this receipt, accept the tobacco as that purchased? With respect to the last two of these questions, the jury should have been told that the receipt of goods involves the taking possession of them, and that while it is true that there may be an acceptance and actual receipt of goods by the vendee pursuant to a sale, unaccompanied by a manual delivery of actual change of custody—as in cases where the vendee is already in possession, or the vendor retains the custody as bailee of the vendee, thus assuming a new relation to ³⁸⁰ the goods—yet the law requires that the proof in such cases should be clear and unequivocal, and establish an actual change of the relation of the parties to the property: Browne on Statute of Frauds, 5th ed., sec. 320; Benjamin on Sales, sec. 145; 1 Mechem on Sales, secs. 375, 384; Knight v. Munn, 118 Mass. 143; Michael v. Curtis, 60 Conn. 363, 22 Atl. 949; Lillywhite v. Devereux, 15 Mees. & W. 285; Prescott v. Locke, 51 N. H. 94, 12 Am. Rep. 55.

The jury should have been told that as a receipt implies a delivery, there must have been a delivery by the vendor and receipt by the vendee of the tobacco, with an intention on the part of the parties to vest in the vendee the possession and right of possession, and discharged of all lien for the price, and an actual acceptance by the vendee of the tobacco, at least as the goods purchased, if not as its owner by virtue of the purchase: Morton v. Tibbett, 15 Q. B. 428; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. Rep. 369; Safford v. McDonough, 120 Mass. 290; March v. Rouse, 44 N. Y. 643; Bailey v. Ogden, 3 Johns. 399, 3 Am. Dec. 509; Messer v. Woodman, 22 N. H. 172, 182, 53 Am. Dec. 241. They should have been told that the statute requires something more, by way of proof of a receipt and acceptance, than mere words indicative merely of the parties' assent to the agreement of sale, and that it was not enough to satisfy the condition of receipt that the title to the tobacco had become vested in the purchaser: 1 Mechem on Sales, secs. 377, 383; Crug v. Gorham, 74 Conn. 541, 51 Atl. 519; Meade v. Smith, 16 Conn. 346.

These legal principles the defendant was entitled to have presented to the jury, together with such other pertinent observations as were required to disclose their application to the circumstances in evidence. The failure of the court in both respects is apparent.

The defendant's first reason of appeal is to the effect that the court erred in holding that the plaintiff acquired any right or title in the subject matter of the action by the assignment to him. It does not appear that this claim was made below. As the case, however, goes back for a retrial, we ought, perhaps, in fairness to make a few observations in anticipation of questions which may then arise. The complaint alleges that the plaintiff is the assignee of the claim ³⁸¹ sued upon, and its equitable and good faith owner. Upon the trial the plaintiff, in support of this allegation, offered in evidence the instrument of assignment. Apparently there was no other evidence bearing upon the question, and the jury found the allegation proved. While the instrument was informal and perhaps ambiguous, it can scarcely be said that, as a matter of law upon the evidence before them, the jury erred. In *Gaffney v. Tammany*, 72 Conn. 701, 46 Atl. 156, this court defined the status of an equitable and bona fide owner of a chose in action who might sue thereon. It is quite possible that the plaintiff does not, as respects the claim in question, satisfy the conditions. It cannot, however, be said that he does not, from the terms of the assignment alone.

There is error and a new trial is granted.

In this opinion the other judges concurred.

ACCEPTANCE OF GOODS TO SATISFY STATUTE OF FRAUDS.

- I. Necessity of Acceptance Generally.
- II. Kind of Acceptance Required.
 - a. Must be Unconditional and Place Property Within the Control of the Vendee.
 - b. Delivery and Acceptance of Possession.
 - c. Mere Words are Insufficient.
- III. Acts Constituting Acceptance.
- IV. Acceptance of Part of Goods.
- V. Delivery to a Carrier.
- VI. Designation of Carrier by Purchaser.
- VII. Loss of Goods Before Delivery.
- VIII. Acceptance by Agent or Bailee.
- IX. Delivery to Person or at Place Designated by Buyer.
- X. Constructive Acceptance.
- XI. Rejection of Goods.
- XII. Delivery to One of Several Joint Purchasers.
- XIII. Acceptance, Question for Jury.

I. Necessity of Acceptance Generally.

A parol agreement for the sale of chattels without actual delivery and acceptance of the property, or any part thereof, and where nothing is given as earnest or by way of payment, and no written note or memorandum of the agreement is signed by the party sought to be charged thereby, and no acts of ownership over the property is subsequently exercised by the vendee, although it is a condition of the agreement that the vendee shall take the chattels where they then are, and that the vendor shall not be troubled to make any delivery is within the statute of frauds, and void: *Alderton v. Buchoz*, 3 Mich. 322. An oral contract for the sale of goods, no part of the price being paid, and it appearing from the evidence that the buyer has not accepted any part thereof, is void under the statute of frauds: *Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502. If an oral agreement for the sale of goods and chattels is made and no part of the agreed price is paid, a mere delivery of the goods and chattels as stipulated in the agreement will not alone suffice to validate the contract. In such cases the oral contract is not validated so as to satisfy the statute of frauds until there has been a voluntary receipt and acceptance of the goods, on the part of the buyer, and this must be shown by the seller when suing for the price: *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379; *Waincott v. Kellog*, 84 Mo. App. 621; *Gilman v. Hill*, 36 N. H. 311; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Clark v. Tucker*, 2 Sand. 157; *Dinnie v. Johnson*, 8 N. Dak. 153, 77 N. W. 612. The mere delivery of the goods to the vendee is not sufficient to take the case out of the statute of frauds; he must accept and receive them: *Gibbs v. Benjamin*, 45 Vt. 124. The receipt of the goods alone, without an acceptance, is not sufficient: *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461. If the buyer receives the goods, but fails to accept them, and rejects them, immediately or within a reasonable time, the agreement is not taken out of the statute, since there must be both a receipt and a voluntary acceptance to satisfy it: *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379; *Waincott v. Kellog*, 84 Mo. App. 621. To constitute acceptance and receipt, within the statute of frauds, in case of a verbal sale of goods, there must be a delivery of the goods with intent to vest the right of possession in the vendee and an actual acceptance by the latter with intent to take possession as owner. The fact that the vendee sells, or offers to sell, such goods at their place of destination in anticipation of their arrival does not amount to such an assumption of authority or ownership over them as will constitute an acceptance and receipt within the statute: *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533. As an acceptance and actual receipt by the buyer of the goods verbally bargained for, must be shown, no promise or declaration of the buyer that he will take the goods, then left for him at another place, at a future day, can be held an acceptance, or an admission of acceptance: *Shepherd v. Pressey*, 32 N. H. 49.

But if goods are sold under an oral contract to be paid for upon delivery, and after such delivery are retained for a long time by the buyer without objection before they are rejected by him, such an acceptance may be inferred from his acts as will satisfy the statute of frauds: *United States Reflector Co. v. Rushton*, 7 Daly, 410. If a buyer accepts goods without objection, after canceling his order therefor, such receipt and acceptance are sufficient under the statute of frauds, to complete the sale: *Sullivan v. Sullivan*, 70 Mich. 583, 38 N. Y. 472. If there are two separate contracts for the sale of different articles, the acceptance of one of them does not take the contract for the other out of the statute, but if there is but one contract for the sale of both, delivery and acceptance of one takes the other out of the statute: *Weeks v. Crie*, 94 Me. 458, 80 Am. St. Rep. 410, 48 Atl. 107.

II. Kind of Acceptance Required.

a. **Must be Unconditional and Place Property Within Control of the Vendee.**—There must always be an unconditional acceptance of the goods purchased by the buyer under a verbal contract of sale in order to satisfy the requirements of the statute of frauds. In other words, to constitute a sufficient delivery under an oral agreement for the sale of personal property, the property must be placed within the control, and under the exclusive dominion of the buyer: *Marsh v. Rouse*, 44 N. Y. 643. The acceptance and receipt of merchandise under an oral contract of sale, sufficient to satisfy such statute, must be such a transfer of the physical possession of the property as places the goods beyond the control of the vendor and within the control of the vendee. Such transfer is not accomplished, where, under such contract, the goods are left in the possession and control of the vendor, pending the taking of an inventory by him to determine the price to be paid for the goods: *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366. To make a verbal sale of chattels valid under the statute of frauds delivery must be made, the vendee must take actual possession, that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be continuous, not taken to be surrendered back, not formal but substantial. But it need not be continued indefinitely, when it is bona fide and openly taken; and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee: *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500. If the goods are delivered subject to examination, the receipt thereof by the purchaser will not alone constitute an acceptance sufficient to take the case out of the operation of the statute. To constitute such acceptance as will give validity to the contract, it is requisite that the purchaser shall have made the examination and pronounced it satisfactory, or shall have dealt with the goods, or done some unequivocal act evincing his intent to accept them unconditionally as

his own: *Stone v. Browning*, 68 N. Y. 598. In an earlier report of this case it was held that the mere receipt of the goods by the vendee will not take the sale out of the operation of the statute. There must be some act or conduct on his part manifesting his intention to accept them absolutely and unconditionally in full performance of the contract of sales: *Stone v. Browning*, 51 N. Y. 211.

b. Delivery and Acceptance of Possession.—The authorities are generally agreed that to satisfy the statute there must be a delivery of the goods, or at least a part thereof, bargained for, with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intention of taking possession of them as owner, evinced by some unequivocal act or conduct which would be justified if he were the owner and not otherwise: *Dauphiny v. Red Poll Creamery Co.*, 123 Cal. 548, 56 Pac. 451; *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578; *Snow v. Warner*, 10 Met. 132, 43 Am. Dec. 417; *Mechanical Boiler Cleaner Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461. The seller must show some unequivocal act of acceptance, and, if the goods are sold by sample, it is not enough for him to show merely that the goods came into the possession of the buyer, and that they corresponded with the sample: *Remick v. Sandford*, 120 Mass. 309. If the contract is sought to be validated on the ground of acceptance and actual receipt of part of the goods by the vendee, this must be shown by the vendor, and, if the vendee refuses to take the goods, the question whether his refusal is reasonable or not is immaterial, and placing the property in charge of the vendee, to allow him to test it, to enable him to decide whether he will buy is not such acceptance as satisfies the statute: *Mechanical Boiler Cleaner Co. v. Kellner*, 62 N. J. L. 544, 43 Atl. 599.

c. Mere Words are Insufficient.—To constitute a delivery and acceptance of goods, such as the statute of frauds requires under a verbal contract of sale, something more than mere words is necessary. Superadded to the language of the contract and the declarations of the parties there must be some act of theirs amounting to a transfer of the possession and an acceptance thereof by the buyer and the case of cumbrous articles is not an exception to this rule: *Shindler v. Hunston*, 1 N. Y. 261, 49 Am. Dec. 316; *Ham v. Van Orden*, 4 Hun, 709, 5 Hun, 654. Mere words alone, unaccompanied by acts, cannot make out a delivery and acceptance of goods, because a delivery of goods to take a contract of sale out of the statute of frauds, must be of such a nature that the property is placed under the control and power of the vendee, and the acts, to change the possession of the property from the vendor to the vendee, must be such as to deprive the vendor of his right of lien as

security for the payment of the purchase money: *Gardet v. Belknap*, 1 Cal. 399.

III. Acts Constituting Acceptance.

The exercise of ownership over personal property bargained for, by using a portion thereof for the purpose for which it was bought, or by selling a portion of it to a third person, is the exercise of such an act of ownership as to constitute an acceptance, and independently of any note or memorandum, to take the parol contract to purchase out of the statute of frauds: *Phillips v. Oemulgee Mills*, 55 Ga. 633; and, generally, a resale by the first purchaser before delivery of the goods to him is the exercise of such an act of ownership as to constitute an acceptance: *Bone v. Ellis*, 3 Misc. Rep. 92, 22 N. Y. Supp. 369. If the buyer, after goods are delivered on his premises, has a right to have them inspected before accepting them, a resale of them by him without inspection is a waiver of such right and constitutes a full acceptance: *Hill v. McDonald*, 17 Wis. 100. Generally speaking, proof of any act from which it may reasonably be inferred that the seller has abandoned possession as owner, and that the purchaser has assumed it is sufficient evidence of an acceptance and receipt. Thus, if a model of an invention was at the time of making an oral contract for the sale of a device delivered to and retained by the purchaser, who thereafter applied for and obtained a patent for such device, full acceptance of the article of sale may be inferred: *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279. If the purchaser of a slave takes possession, without any qualifying act, and retains such possession for a short time without making any objection, a consummation of the sale may be inferred: *Kelly v. Brooks*, 25 Ala. 523. If a party to a parol contract of sale examines the goods furnished him pursuant to the contract, and they are subsequently placed by his order at a certain place in his possession, there is sufficient delivery and acceptance to satisfy the statute: *Burkalow v. Pfeiffer*, 38 Ind. 214. If goods are sold by sample and part of them delivered to the buyer in pursuance of the contract, and after opening and inspecting them he undertakes to return them, there is sufficient acceptance to satisfy the statute of frauds and bind him for the price, provided the goods received agreed with the sample: *Smith v. Stoller*, 26 Wis. 671. The execution and delivery of a chattel mortgage on goods by a vendee shortly after their receipt by him are the exercise of such acts of ownership as will constitute an acceptance of the goods under the statute: *Wyler v. Rothchild*, 53 Neb. 566, 74 N. W. 41. Upon a sale of personalty, any positive act of the parties indicative of the exercise of ownership on the part of the buyer may raise an inference of due receipt and acceptance by him. Thus when he buys a stock of goods at an oral sale, takes an inventory thereof, and requests his agent to keep the keys to the store containing the goods, for him until the next day, his acts are sufficient to evidence a receipt and acceptance: *Gray v. Davis*, 10 N. Y. 285.

IV. Acceptance of Part of Goods.

A part performance of a verbal contract of sale by delivery by the vendor of part of the goods bought and their receipt and part payment by the vendee constitute such an acceptance as takes the entire contract out of the statute of frauds: *Sloan Sawmill Co. v. Guttshall*, 3 Colo. 8; *Joseph v. Struller*, 25 Misc. Rep. 173, 54 N. Y. Supp. 162; *Van Woert v. Albany etc. R. R. Co.*, 67 N. Y. 538; *Danforth v. Walker*, 40 Vt. 257. And the acceptance and receipt by the vendee of a part of a quantity of goods sold by parol contract takes such contract out of the statute of frauds, although no payment was made at the time, and though no part of the goods were taken by the buyer until some time after the sale: *Davis v. Moore*, 13 Me. 424; *Rickey v. Tenbroeck*, 63 Mo. 563; *Meyer v. Thompson*, 16 Or. 194, 18 Pac. 16. If a verbal order for goods is entire, the acceptance of part of the goods, though shipped at a different time from the other, will make the entire contract valid: *Fanner v. Gray*, 16 Neb. 401, 20 N. W. 276. Thus, a contract for the sale of a large amount of wood upon a certain lot of land, at a certain amount per cord, the vendor to deliver as much as he could that winter, and the remainder during the following winter and year, the buyer to pay for what was delivered at the close of each winter's delivery is an entire contract of sale of the whole quantity, and a delivery and acceptance of a part of the wood the first winter will take the case out of the statute of frauds: *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210. And, again, on a sale of hay the acceptance, receipt and payment for part of the hay removed by the purchaser are a "recognition of the contract of sale, and a sufficient acceptance and receipt of part of the property sold to meet the requirements of the statute of frauds and take the case out of its operation. It is not necessary that the delivery and receipt accompany the sale. If the receipt of the property, or a part of it, takes place in pursuance of the previous verbal agreement, it is sufficient. It is the fact of delivery and receipt under and in pursuance of the previous agreement of sale, and not the time when the delivery is made, that the statute makes essential to the proof of a valid contract": *Towne v. Davis*, 66 N. H. 396, 397, 22 Atl. 450. The rule generally recognized by the authorities is that the acceptance and receipt of part of the articles purchased under an entire contract of sale, or of all of any one class of them, necessarily takes the whole contract out of the statute: *Weeks v. Crie*, 94 Me. 458, 80 Am. St. Rep. 410, 48 Atl. 107; *Damon v. Osborn*, 1 Pick. 476, 11 Am. Dec. 229; *New England etc. Co. v. Standard Worsted Co.*, 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112; *Bradley v. Wheeler*, 44 N. Y. 495; *Brock v. Knower*, 37 Hun, 609; *Cotterill v. Stevens*, 10 Wis. 422-426; *Garfield v. Paris*, 96 U. S. 557. Thus, a vendee of staves under an oral contract of sale, hav-

ing taken a portion thereof from the vendor's piles of staves, and never having returned, or offered to return, any part of those taken, is estopped to set up that there has not been such an acceptance and receipt by him of part of the staves as take the contract out of the statute of frauds: *Theilen v. Roth*, 80 Wis. 263, 50 N. W. 183. In *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47, it was held, although we are unable to follow the reasoning of the case, that under an oral agreement to purchase all the leather of a certain thickness in a large pile of leather, the leather to be selected by the seller, the delivery of the part selected to a common carrier, not expressly authorized by the purchaser to accept, and the acceptance of that part from the carrier, without any intention to thus accept the remainder when selected, does not constitute a sufficient acceptance to take the contract of sale out of the statute of frauds. In another case it was held that if part payment of the purchase price is relied upon to take a parol contract for the sale of goods out of the statute of frauds, the payment must be shown to have been made when the contract was entered into. If this is shown, a delivery and acceptance of a part of the goods takes the case out of the statute of frauds, although it takes place after the parties have agreed to the conditions of the sale: *Chapin v. Potter*, 1 Hilt. 367.

V. Delivery to a Carrier.

Mere delivery by the seller to a carrier selected by him for transportation to the purchaser is not such a delivery, receipt and acceptance, as will take the agreement out of the operation of the statute: *Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199; *Keiwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Rindskopf v. De Ruyter*, 39 Mich. 1, 33 Am. Rep. 340; *Simmons Hardware Co. v. Mullen*, 33 Minn. 195, 22 N. W. 294; *Heermance v. Taylor*, 14 Hun, 149; *Hudson Furniture Co. v. Freed Furniture Co.*, 10 Utah, 31, 36 Pac. 132; *Williams etc. Shoe Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 342. If the delivery to a carrier is merely in pursuance of a verbal contract under which the goods are purchased, and the carrier has no independent and separate authority to act for the purchaser, the acceptance of the goods by the carrier and their delivery at the place of business of the purchaser, is not an acceptance and receipt of the goods by him: *Grimes v. Van Vechten*, 20 Mich. 410. Delivery of the goods to the carrier by the seller is not an acceptance thereof by the seller, especially when he has never applied to the carrier for the goods, nor paid the freight: *Agnew v. Dumas*, 64 Vt. 147, 23 Atl. 634. If merchandise is purchased upon the verbal understanding between the purchaser and a third person that it is to be sold to the latter if it proves satisfactory to him, and is delivered by the purchaser in accordance with such understanding to a carrier not designated or selected by such third person, and is by the purchaser consigned to him by bill of lading, there is no sufficient delivery and acceptance of the goods by such third person to satisfy

the statute of frauds, and the title to the goods still remains in the consignor: *Nugent v. Blakes*, 34 App. Div. (N. Y.) 123, 54 N. Y. Supp. 486. Mere delivery, by the seller, to a common carrier is not an acceptance and receipt thereof by the buyer within the statute, so long as the buyer has a right to object either to the quantum or the quality of the goods: *Lloyd v. Wright*, 25 Ga. 215.

However, a delivery of goods, to a common carrier for transportation, the receipt and acceptance of the goods by the purchaser without objection at their place of destination and the payment of the freight charges thereon, are sufficient to take the contract out of the statute of frauds: *Wyler v. Rothschild*, 53 Neb. 566, 74 N. W. 41. If, after an order for goods is received and acted upon by the vendor, by delivering the goods to a common carrier for transportation to the vendee, the latter countermands the order, but the countermand is not consented to by the vendor, and the goods are afterward received by the vendee, who subsequently executes a mortgage on them as his property, such acceptance by him vests the title to the goods in him and satisfies the statute of frauds: *Leggett etc. Co. v. Collier*, 89 Iowa, 144, 56 N. W. 417.

VI. Designation of Carrier by Purchaser.

Although there is some conflict in the cases, we think that the current, as well as the weight of, authority sustains the rule that the mere designation of a certain carrier by the buyer of goods under a verbal contract by whom the goods bought are to be transported and delivered to him, does not constitute such a receipt and acceptance of the goods by him as will satisfy the statute of frauds. Under the general rule elsewhere stated, to constitute acceptance and receipt within the meaning of such statute in case of a verbal sale of goods, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter with intent to take possession as owner, and although such acceptance and receipt may be made by the agent of the buyer, empowered for that purpose, yet an agency to accept and receive cannot be inferred from the fact that the buyer has designated a certain carrier to whom the goods are to be delivered for the purpose of transportation and delivery: *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533. Hence the cases generally maintain that delivery to a carrier specified in the contract of sale or designated by the buyer, does not take such contract out of the operation of the statute. There must be an acceptance and receipt by the vendee or his authorized agent, and an authority to receive for transportation, carries with it no implied authority to accept: *Billin v. Henkel*, 9 Colo. 394, 13 Pac. 420; *Allard v. Greasert*, 61 N. Y. 1; *Hudson Furniture Co. v. Freed Furniture Co.*, 10 Utah, 31, 36 Pac. 132. If goods are delivered to a certain carrier by direction of the buyer, but he never has any actual possession or exercises any control over them, nor receives

any bill of lading, there is not a sufficient acceptance and receipt to take the sale out of the statute of frauds: *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545. An oral contract for the sale of goods by sample is not taken out of the statute by a delivery to a carrier designated by the buyer, who has no independent or separate authority to act for such buyer in accepting them: *Smith v. Brennan*, 62 Mich. 349, 4 Am. St. Rep. 867, 28 N. W. 892. An acceptance of goods, to be effectual to avoid the effect of the statute of frauds as to oral agreements for the sale of personalty, must be something more than a mere receipt of the goods delivered. In such case an effectual acceptance can be inferred only from some act or course of conduct on the part of the buyer manifesting a present intention to receive the goods in performance of the agreement, and to appropriate them as his own. And even if the buyer, at the time of making the void agreement, directs that the goods be delivered, to a designated carrier for the purpose of being transported to the place where they are to come into his possession, and the goods are so delivered and transported, this alone does not bring the case within the statutory provision requiring the acceptance of the goods: *Fontanier v. Bush*, 40 Minn. 141, 12 Am. St. Rep. 722, 41 N. W. 465. In *Allard v. Greasert*, 61 N. Y. 5, Mr. Justice Earl, in delivering the opinion of the court, said: "So far as I can discover, it has never yet been decided in any case that is entitled to respect as authority, that a mere carrier designated by the buyer can both accept and receive the goods so as to answer the statute. It will be found by an examination of the authorities, that in most of the cases where a delivery to a carrier has been held to satisfy the statute of frauds there has been a prior acceptance of the goods by the buyer or his agent. A buyer may receive and accept through an agent expressly or impliedly appointed for that purpose. There is every reason for holding that a designated carrier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a mere formal act, requiring the exercise of no discretion. But there is no reason for holding that the buyer, in such case, intended to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract of which such agents can know nothing." Such a case as that mentioned by the learned judge just quoted is the case of *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721, where it was held that if a contract of sale is verbal, the delivery of goods, after acceptance by the buyer, to a carrier designated by him, is sufficient to satisfy the statute of frauds.

It has been broadly held in Vermont, upon the authority of some English cases, that the delivery of goods to, and their acceptance by, a common carrier named by the purchaser is of itself a sufficient receipt and acceptance by him of the goods purchased to take the sale and the verbal contract therefor out of the operation of the

statute of frauds. This holding is placed upon the ground that under such transaction the carrier becomes the express agent of the purchaser to accept and receive the goods for him: *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309; *Strong v. Dodds*, 47 Vt. 348.

VII. Loss of Goods Before Delivery.

As a general rule, the mere delivery of goods by the vendor pursuant to a verbal contract of sale is not sufficient to take the contract out of the statute of frauds. To effect this the vendee must both accept and receive the goods. Hence if goods thus sold are lost by flood before the vendee receives them, there is no such acceptance as satisfies the statute: *Gibbs v. Benjamin*, 45 Vt. 124. Thus, if a cargo of coal is sold under a verbal contract and shipped to the purchaser by a vessel which is wrecked by the way, thus preventing the purchaser from receiving the coal, the seller cannot maintain an action against the buyer for the purchase price because, under the statute of frauds, in the absence of a written memorandum of sale, there must be an acceptance by the buyer as well as a delivery by the seller: *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605. To the same effect is the case of *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. 115. The vendees filled a verbal order for lumber, placed it on a certain dock and gave notice thereof as required by the terms of the contract of sale, but before the purchaser removed it, it was accidentally destroyed by fire, and it was held that the contract was within the statute of frauds, that there had been no receipt and acceptance of the lumber by the purchaser sufficient to satisfy such statute, that the title to the lumber had not passed, and that the purchaser was not liable for the price agreed to be paid: *Cooke v. Milliard*, 65 N. Y. 352, 22 Am. Rep. 619.

In the case of *Strong v. Dodds*, 47 Vt. 348, the court reached a conclusion somewhat at variance with the holdings in the above cases. In the last-named case the seller, pursuant to the buyer's order, packed goods and marked them to him and delivered them to a carrier designated by him for transportation and duly advised him thereof. The goods were lost while in the hands of the carrier before delivery. It was held that the carrier was the agent of the buyer, and that the receipt of the goods by it was such an acceptance and receipt thereof by the buyer as to take the case out of the statute of frauds and make him liable for the price. This holding was placed upon the ground that the buyer by designating the carrier himself thereby made him his agent: *Strong v. Dodds*, 47 Vt. 348-356.

VIII. Acceptance by Agent or Bailee.

A delivery of goods by the vendor and an acceptance by the agent or bailee of the vendee, expressly authorized to receive and accept are sufficient to take a verbal contract of purchase out of the operation of the statute of frauds, although there is no earnest paid, and no note or memorandum in writing: *Vanderbilt v. Central R. R. Co.*,

43 N. J. Eq. 670, 12 Atl. 188; *Outwater v. Dodge*, 6 Wend. 397. "In order to constitute an acceptance and receipt under the statute of frauds, it is not enough that the title in the goods has vested in the buyer, but he must have assumed the legal possession of them, either by taking them into the custody and control of himself or of his authorized agent, or by making the seller or a third person his bailee to hold them for him, so as to terminate the seller's possession of the goods, and lien for their price": *Rodgers v. Jones*, 129 Mass. 422. To make a valid sale of personalty, in the possession of a third party, there being nothing in the transaction but a verbal contract, such third person must agree to hold the property as the agent or bailee of the buyer: *Bassett v. Camp*, 54 Vt. 232. But, if, on the sale of chattels which without delivery and acceptance would be void under the statute of frauds, the vendee constitutes the vendor his bailee of the goods, and the vendor thereafter holds them as such bailee, the delivery and acceptance are complete and the sale is good as between the parties: *Janvein v. Maxwell*, 23 Wis. 51. If a contract of sale rests wholly in parol, and no part of the purchase money is paid, a delivery of the goods to, and an acceptance thereof by the vendee being relied upon to take the sale out of the operation of the statute of frauds, the same person cannot act as agent for both parties to the contract of sale. The same person cannot act as agent of the seller to negotiate the sale, and as the agent of the buyer to receive and accept the goods: *Caulkins v. Hellman*, 14 Hun, 330, 47 N. Y. 449, 7 Am. Rep. 461. The mere fact that the possession of the goods is in the vendee or his agent at the time of making the contract furnishes no evidence of a receipt and acceptance on his part sufficient to establish the validity of the contract under the statute of frauds: *Matter of Hoover*, 33 Hun, 553; *Dorsey v. Pike*, 50 Hun, 534, 3 N. Y. Supp. 730. If an agent holding personal property for his principal as lessee thereof makes a contract with the lessor, by which he purchases such property on behalf of his principal, no part of the purchase money being paid, it is necessary in an action by the vendor to enforce the contract to show some affirmative act of delivery and acceptance of the property under the contract, although at the time of sale the property is in the possession of the agent of the vendee: *Dorsey v. Pike*, 50 Hun, 534, 3 N. Y. Supp. 730.

IX. Delivery to Person or at Place Designated by Buyer.

If an oral order is given for the purchase of goods and the seller is instructed by the buyer to deliver them to a certain named person, who receives them without objection, and the goods are in fact such as were ordered and are without defect, or deficiency, they are deemed received and accepted by the purchaser himself through his agent constituted for that purpose: *Schroder v. Palmer Hardware Co.*, 88 Ga. 578, 15 S. E. 327; *Moore v. Hays*, 12 Ind. App. 476, 40 N. E. 638; *Snow v. Warner*, 10 Met. 132, 43 Am. Dec. 417; *Dean v. Tallman*, 105 Mass. 443; *Dyer v. Forest*, 2 Abb. Pr. 282. Generally, the

mere delivery of goods at a place designated by the buyer without his exerting any act of ownership over them subsequent to such delivery will not constitute such acceptance and receipt of the goods by him as will satisfy the statute of frauds. Thus, if one person asks another to select a certain lot of lumber for him, saying that the vessel that was to take it was on her way, and would be there before the selection could be made. Such person selected the lumber, and the vessel not having arrived, marked it with the buyer's name and left it on a certain wharf ordering his men to deliver it to the vessel when she should arrive, and it was held that there was no acceptance and receipt by the buyer sufficient to satisfy the statute of frauds: *Howard v. Borden*, 13 Allen, 299. To the same effect: *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619. The depositing of articles purchased in a public highway at a point designated by the purchaser, and a notification to him of the fact of such deposit, and a promise on his part of payment, is not an acceptance by him taking the case out of the statute: *Finney v. Apgar*, 31 N. J. L. 260. In *Brewster v. Taylor*, 63 N. Y. 587, a person contracted orally to purchase a wagon which was then fitted with shafts, but, as he desired a wagon for two horses, the seller agreed to fit the wagon with a pole, which, upon examination, it was found could not be done, and the seller, without further consultation with the buyer, sent the wagon to a stable, where the latter had directed it to be delivered, and it was held that the contract of purchase was void under the statute of frauds, no acceptance or receipt of the wagon having been shown. Under some circumstances, however, a purchaser, without actually taking the goods into his possession, may exercise such acts toward them as to constitute an acceptance. Thus, if, by the contract of sale, lumber is to be delivered at a certain wharf, where it is actually delivered, the buyer contending that he never received it, but admitting that he saw part of it there, and also admitting to a third person that he had bought it, and to another who applied to him to buy a part thereof that he could not spare any part of it, this is a sufficient acceptance of the lumber, or of a part of it, to take the case out of the statute of frauds and render the buyer liable for the purchase price: *Bulkley v. Waterman*, 13 Conn. 828.

X. Constructive Acceptance.

Although a purchaser's receipt and acceptance of goods sufficient to satisfy the statute of frauds may be constructive (*Johnson v. Watson*, 1 Ga. 348; *Garfield v. Paris*, 96 U. S. 557), yet such constructive receipt and acceptance of goods can only be proved by clear and unequivocal acts on the part of the buyer: *Clary v. Labreche*, 63 N. H. 397. The rule generally recognized is, that actual delivery of the goods or part of them is not always required by the statute of frauds, but a virtual or constructive delivery may be sufficient. Those circumstances which ought to be held tantamount to an actual delivery ought, however, to be so strong and unequivocal

cal, as to leave no doubt of the intent of the parties. Thus, an agreement with the vendor about the storage of the goods, and the delivery by him of the import entry to the agent of the vendee does not amount to a sufficient constructive delivery and acceptance: *Bailey v. Ogden*, 3 Johns. 399, 3 Am. Dec. 509; *Clark v. Labreeche*, 63 N. H. 397. The rule has been announced that the continued change of possession required by the statute of frauds to validate an oral sale of goods must be actual, and not constructive, and that if the owner of goods makes a bona fide sale of them to a purchaser, who takes possession, and thereupon appoints the seller his agent to take charge of and sell the same goods for him, the receipt and acceptance by the purchaser are not sufficient as against the creditors of the first seller: *Fitzgerald v. Gorham*, 4 Cal. 289, 60 Am. Dec. 616. If a person sells goods in a warehouse, and gives a bill of the goods and an order on the warehouseman to the buyer without notifying the warehouseman, this is not such a delivery to, or acceptance by the buyer as satisfies the statute of frauds: *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 196. If a seller consigns goods to a buyer and leaves the bill of lading therefor at the office of the buyer, where in his absence it is received by his clerk and before he has actual notice that the bill of lading has been thus received he notifies the seller that he will not receive the goods, and upon receiving notice that the bill of lading is at his office notifies his clerk to return it immediately to the seller, which is done, but not before the goods have arrived, there is no such receipt and acceptance of the goods as will take the case out of the statute of frauds in the absence of evidence of authority on the part of such clerk to receive and accept the bill of lading: *Quintard v. Bacon*, 99 Mass. 185. If, by the terms of the contract of sale, the purchaser is to send for the goods and take them away, and he goes to the store of the seller, takes the bill of the goods, asks if they are ready, and being informed that they are, and they being pointed out to him, he says that he will send for them, the facts do not show such an acceptance and receipt of the goods as will take the contract of sale out of the statute of frauds: *Knight v. Mann*, 120 Mass. 219.

XI. Rejection of Goods.

The cases are generally agreed that if the vendee under a verbal contract of sale, intending to accept the goods if found to be such as have been ordered, takes them into his possession for examination, and then, within a reasonable time, refuses to accept them as not conforming to the order, this is not an acceptance within the meaning of the statute, especially if the goods are not in fact such as the order calls for. In other words, so long as the buyer continues to have the right to object either to the quantity, or quality of the goods, there is no receipt to satisfy the statute: *Lloyd v. Wright*, 25 Ga. 215; *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578; *Simpson v. Krumdick*, 28 Minn. 354, 10 N. W. 18; *Remick v. Sandford*, 120 Mass.

309; *Shepherd v. Pressey*, 32 N. H. 58; *Rogers v. Phillips*, 40 N. Y. 531; *Strong v. Dodds*, 47 Vt. 358; *Bacon v. Eccles*, 43 Wis. 227. "The best considered cases hold that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold," in order to constitute a receipt and acceptance by the purchaser sufficient to satisfy the statute of frauds: *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 322. This quotation is quoted with approval and the rule sustained in *Hausman v. Nye*, 62 Ind. 491, 30 Am. Rep. 199, and in *Bacon v. Eccles*, 43 Wis. 236. But the purchaser's right to repudiate a parol sale of goods must be exercised in some cases immediately, and in all others within a reasonable time after delivery of the goods to him, or he will be regarded as having accepted them to the satisfaction of the statute: *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309; *Gibbs v. Benjamin*, 45 Vt. 130.

XII. Delivery to One of Several Joint Purchasers and acceptance by him of goods bought under a verbal contract, void under the statute of frauds, renders the contract valid as to all of the joint purchasers under the decision in *Smith v. Milliken*, 7 Lans. 336. But in *Chamberlain v. Dow*, 10 Mich. 319, it was decided by a divided court, Chief Justice Martin dissenting, that the acceptance of the goods by one joint purchaser, without the knowledge or consent of the other, will not amount to a receipt and acceptance of the goods, or a ratification of the void contract as to both. We are inclined to accept the language of Chief Justice Martin as stating the better rule: "In every joint purchase each joint purchaser makes of necessity, his copurchaser his agent for the receipt of the property; in other words, the delivery to one under the contract is a delivery to all. The acceptance by one of the plaintiffs in error was the acceptance by both, as joint purchasers, either obtaining the property under the order acted for both and his act bound both," so as to satisfy the statute of frauds: *Chamberlain v. Dow*, 19 Mich. 326.

XIII. Acceptance, Question for Jury.

The question whether there has been such an acceptance and receipt of the goods or a part thereof, by the buyer under a verbal contract of sale as will satisfy the statute of frauds and make him liable for the purchase price is generally one for the jury to determine, it being a question of intention to be solved from the evidence: *Boss v. Walsh*, 39 Mo. 192; *Pinkham v. Mattox*, 53 N. H. 605; *Burrows v. Whitaker*, 71 N. Y. 295, 27 Am. Rep. 42; *Somers v. McLaughlin*, 57 Wis. 358, 15 N. W. 442. Any act from which it may be inferred that a purchaser has taken possession of the goods purchased as owner presents a question for the jury to determine whether the act was done with intention to accept and thus take

the case out of the statute of frauds: Gray v. Davis, 10 N. Y. 285; Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279; Becker v. Holm, 89 Wis. 86, 61 N. W. 307. In such case the question whether the buyer has received and accepted any part of the goods is rather one of fact for the jury than one of law for the court: Smith v. Stoller, 26 Wis. 671.

CITY OF WATERBURY v. PLATT BROTHERS & CO.

[75 Conn. 387, 53 Atl. 958.]

EMINENT DOMAIN.—Authority to Take Property for a permanent public use does not necessarily imply power to take property for a temporary public use. (p. 231.)

EMINENT DOMAIN.—Limitation of Power.—If power to exercise the right of eminent domain is delegated to a private or municipal corporation, the extent of the power is limited by the express terms or clear implication of the statute authorizing its exercise. (p. 231.)

EMINENT DOMAIN.—Power to Take Property Temporarily.—If the legislature has power to take property under the exercise of the right of eminent domain for a limited period of time, its intention to do so must be clearly expressed. (p. 232.)

EMINENT DOMAIN.—Damages for Temporary Use—Evidence.—A city claiming the right to discharge its surface and sewer drainage upon the property of a lower proprietor for a limited period of time merely upon paying him damages therefor, must show its legislative authority by clear and specific terms definitely expressed. (p. 232.)

J. O'Neill and L. F. Burpee, for the appellant.

II. Stoddard, for the appellee.

³⁸⁹ HAMERSLEY, J. The essential averments of fact contained in the application may be stated thus: For some years past the city of Waterbury has conveyed, by means of the Naugatuck ³⁹⁰ river, portions of the filth and noxious substances accumulated by its inhabitants to the premises of the defendant, and the putrefaction of the substances thus deposited has damaged the property of the defendant, and seriously endangered the health of those living on the premises and employed about the manufacturing establishments thereon. By a judgment of the superior court the city has been compelled to pay the damages suffered by this defendant by reason of these wrongful acts prior to April 23, 1901. The city intends to continue on the defendant's premises the nuisance described, until it has discovered and carried out some feasible plan for

otherwise disposing of said substances; it has used due diligence to discover said plan and will discover and carry out said plan within a period of five years. The city has been unable to agree with the defendants as to the amount of damage resulting from its acts, past and intended. The legislature conferred upon the city by an act amending its charter, approved April 14, 1881, the powers described in section 4 thereof. Said filth and noxious substances were collected and discharged into the Naugatuck river by means of certain sewers constructed by said city under the authority given in said act.

Upon these facts the city claims relief, through the appointment of a committee which shall fix and determine the damages the defendant has suffered and will suffer during a period not exceeding five years, by reason of the acts described.

It is certain that the court has no power to grant such relief unless it is conferred by the statute referred to. It is also certain that authority for such an extraordinary proceeding should not be gathered from doubtful inferences, but should be unmistakably expressed.

The claim of the applicant is that it is authorized to act as agent of the state in taking private property for public use, and to take any property of the defendant that can be regarded as appropriated by doing the acts it proposes to do; and its claim therefore involves the proposition that what it proposes to do is necessary to the sewerage of the city of ³⁹¹ Waterbury, as contemplated by the legislature in authorizing the construction of sewers which shall discharge their contents into the Naugatuck river. It may well be doubted whether the mere authority to construct sewers, emptying into a river flowing through an inhabited country, can imply authority to do the acts described.

The treatment of that part of a city's sewage which comes from the necessity of surface drainage involves different considerations from those applicable to the treatment of that part of the sewage which comes from the necessity of disposing of accumulations of excreta and substances of a similar dangerous nature. It is a matter of common knowledge that accumulations of such substances are a source of danger to health and even life, and for this reason their speedy removal from a city's limits has been regarded as a public necessity; and the same necessity demands that they shall be so removed, or in some way rendered harmless, that other citizens shall not be exposed to the dangers from which the inhabitants of a city are relieved.

Assuming the power of the legislature to authorize a city to

maintain nuisances such as are described in the application, even where no controlling necessity exists, it is certainly unlikely that any legislature, in the absence of such necessity, would specifically give to a city such authority, and where the authority is not clearly given, its inference from the use of broad phrases, or doubtful expressions, would be difficult to justify.

In *Platt Brothers & Co. v. Waterbury*, 72 Conn. 531, 550, 77 Am. St. Rep. 335, 45 Atl. 154, we intimated the opinion that if the charter gave the city power to take the respondent's property in this manner, its provisions for instituting proceedings to determine compensation for any property taken should be broadly construed as applicable to all property that might be taken, in view of the rule which requires a law to be so construed, if reasonably possible, as to give it validity. But the question of charter authority to thus take property for the purpose of sewerage, as well as the question of authority to institute ³⁹² proceedings for condemnation, were not then material, and we did not pass upon them.

In the present case the applicant admits that the acts it intends to do are not necessary for the purpose of sewerage. The application affirms its desire and intention of disposing in other ways of the filth it has cast upon the defendant's premises. The very basis of its application is, not the necessity of taking the defendant's property for the purpose of sewerage, but the necessity of taking the property for the purpose of enabling it to continue the nuisance described until it has provided for its abatement. The public use for which it claims authority to take property is a condition arising from its delay, reasonable as is alleged, in providing the appropriate means for exercising the powers given it by the legislature in authorizing the construction of its sewers, and, unlike the public use of sewerage, is a use temporary in its nature. A public use permanent in its nature and indefinite in duration differs from a public use of a temporary nature. The trial court correctly held that authority to take property for a public use of the former kind does not necessarily imply the power to take property for one of the latter kind. When the power to exercise the right of eminent domain is delegated to a private or municipal corporation, the extent of the power is limited by the express terms or clear implications of the statute authorizing its exercise: *Currier v. Marietta etc. R. R. Co.*, 11 Ohio St. 228; *Hibernia Underground R. Co. v. De Camp*, 47 N. J. L. 518, 547, 54 Am. Rep. 197; 4 Atl. 318; *Bishop v. North Adams Fire District*, 167 Mass. 364,

369, 45 N. E. 925. But if the taking of property is authorized for a public use, either of a permanent or temporary nature, the appropriation lasts during the continuance of that use. The applicant's charter authorizes it to take land for the public use of highways. It cannot be claimed that such authority to take land implies the right—upon the city's alleging an intention to discontinue the highway laid out, when a feasible plan for laying out other highways has been discovered and executed, and that it will discover and carry out such plan in five years—to limit the compensation by a valuation of the property ³⁹³ taken for a highway for a period of five years, or to ascertain the whole amount of compensation by a succession of valuations for definite periods. If the legislature can authorize such mode of valuing property taken for public use, whether for the use of highways or use of sewers, it certainly should be clearly expressed. There is nothing in the plaintiff's charter which suggests a legislative sanction for such a mode of proceeding.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

Eminent Domain.—Statutes authorizing the exercise of the power of eminent domain are subject to a strict construction. The power can be exercised only so far as the authority extends, either in terms expressed by the law itself or by implication clear and satisfactory: *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; *Ligare v. Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934. It has been held that a railway company, authorized to condemn land for a right of way, cannot condemn a temporary use nor a use contingent on the happening of a future event: *Hibernia R. R. Co. v. De Camp*, 47 N. J. L. 518, 54 Am. Rep. 197, 4 Atl. 318.

SCHMAELZLE v. LONDON AND LANCASHIRE FIRE
INSURANCE COMPANY.

[75 Conn. 397, 53 Atl. 863.]

INSURANCE—Fire—Blanket Policy.—The very essence of a blanket policy of fire insurance is that it invariably attaches to and covers to its full amount every item of property described in it. If the loss upon one item exhausts the full amount of the policy, the whole insurance must be paid and there can be no apportionment of it. (p. 236.)

INSURANCE—Fire—"Blanket" and "Specific" Policies—Apportionment of Loss.—In apportioning the loss upon property covered by "blanket" policies and "specific" policies, all of which provide that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policies must be regarded as insuring each item to the entire amount unappropriated when it is reached, and the loss must be adjusted by dividing the whole property into items corresponding to those in the specific policies for the purpose of taking the items in the order of the greatest loss, then in computing the amount of insurance upon the first item, apply the full amount of the blanket insurance, and in computing the subsequent items, follow the same procedure, save that the total amount of insurance be reduced by the amount of blanket insurance already exhausted upon former items, and the amount of insurance under any given blanket policy, be likewise reduced by the amount thereof used in prior adjustments. (p. 238.)

W. B. Stoddard and G. R. Cooley, for the appellant.

G. A. Fay, W. L. Bennett and J. H. Webb, for the appellees.

398 PRENTICE, J. The plaintiff is the owner of premises upon which stood a brewery and shed. In the brewery were machinery ³⁹⁹ and stock. Upon the buildings, machinery and stock, the plaintiff carried, in some thirty-four companies, insurance against fire aggregating \$60,000 in amount. These policies were all of the standard form and contained the following provision: "This company shall not be liable under this policy for a greater proportion of any loss on the described property . . . than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property." Thirty-one of the policies covering insurance for \$55,000 were of the kind known as blanket or compound policies; that is, they insured said buildings, machinery and stock as a whole and without distributing the amount of the insurance among the several items. The remaining policies, containing insurance for \$5,000, were of the kind known as specific; that is, the amounts insured thereby were distributed among the several items of property, a specified

amount to each item. Each of these specific policies covered, in the whole, precisely the same property as did the compound insurance, but distributively. The manner of distribution was uniform among the specific policies, and was among four separate items, to wit, the main or brewery building, stock, machinery, and shed as follows: \$1,634.88 on the brewery, \$1,839.21 on the stock, \$1,498.64 on the machinery, and \$27.24 on the shed.

A fire damaged the brewery, stock, and machinery. The sound value of the property insured was \$59,982, divided as follows: Brewery, \$20,586; stock, \$11,085; machinery, \$28,111; and shed, \$200. The loss by the fire was mutually adjusted at \$42,953, distributed as follows: Brewery, \$15,115; stock, \$11,085; machinery, \$16,753; and shed, nothing.

It is conceded that the assured is entitled to receive from the defendants the amount of his loss above stated. The only question in the case is one between the several defendants, as to the sums which each should pay. Between the blanket insurers there is no dispute, and between the specific there is none. The contention is between the two classes of insurers, and is as to the method to be employed in the apportionment of the loss, in view of the provision as to prorating ⁴⁰⁰ which appears alike in all the policies, and which has been quoted.

It is clear that the compound and the specific insurance must be brought together in the prorating. This necessarily involves an adjustment by separate items, and the application in some way of the blanket insurance to each item covered by specific insurance. The question is as to how this shall be done.

The claim of the blanket insurers is that their policies should, for the purpose of the distribution of the loss, be converted into specific ones; specific amounts under the policies being set out to each item upon which there is specific insurance, so that, for the purpose of determining the amount that any blanket policy shall contribute toward any item of loss upon which there is specific insurance, the amount of the blanket policy's insurance upon such item, and the total amount of insurance thereon, shall be computed upon the basis thus ascertained. The methods suggested for making this conversion from compound to specific are two, both of which are claimed as having the approval of authority and experience. One method is to distribute the amount of the blanket policy over the property insured by it, so that the items bearing specific insurance shall be credited with insurance to such a proportionate amount of the whole as the sound value of the specific item bears to the sound value of

the whole. The other is to make this conversion upon the basis of the respective losses upon the property insured.

The specific insurers, upon the other hand, contend that there should be no such conversion; but that in adjusting each item of loss the total amount of insurance thereon, and the amount insured by each blanket policy, be determined by including the entire amount of the compound insurance which has not been previously exhausted in adjusting some other item. The widely differing results to which the two claims might lead are apparent.

In making these claims, and others which are incidental to them, all the parties concede that whatever general rule of apportionment of loss may be adopted it must, in so far as ⁴⁰¹ it is not directly prescribed by the contract, yield in case of need to the interests of the assured. The first requisite of any method of apportionment sought to be applied must be the assured's protection to the full extent of his rights under his policies. Any method which, in a given case, fails to afford him the full measure of his just indemnity must give place to another which will.

In the present case the plaintiff has no concern as to which of the suggested modes be adopted in distributing his loss among his insurers. The interests of the latter are alone involved.

The whole question arises out of the application to the facts of the case of the provisions of the prorating clause in the policies. Each insurer has not entered into an unqualified obligation to indemnify the insured to the extent of his loss, or to the extent of his loss limited by the amount of the policy. It has made a contract which gives it, as against the assured, a benefit arising from coinsurance. It stipulates that its liability shall be limited in amount, dependent upon the existence and amount of such coinsurance. The policy expressly states how its liability shall be determined. The question, therefore, becomes one of contract construction. It is not one of equitable determination in the absence of an agreement, as was the case in certain of the adjudicated cases. We are not called upon to adjust the equities between coinsurers, one having paid more than his fair share of the loss. We are not dealing with the doctrine of subrogation. The parties have recorded their agreement, and we have only to determine its meaning and enforce it.

The policy provision, to restate its pertinent portion, is: "This company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance." It is thus provided that the mode to be employed in

determining the extent of liability is purely a mathematical one, involving the stating of a problem in simple proportion. The three known terms of the proportion from which the fourth, to wit, the amount of the liability ⁴⁰² under the given policy, is to be deduced, are stated to be the whole insurance, the amount insured under the policy, and the loss. The loss is in this case an ascertained sum; in any, it is a determinable one. Where the given policy is a specific one, the second term is also a definite one, and only the first remains open to question. If the given policy is a blanket one, then both the first and second terms are subject to dispute. An answer to a single question, however, resolves all. That question, which thus stands out as the controlling one in the situation, is thus seen to be this: By the terms of a blanket policy what amount of insurance attaches to each item embraced within the insurance?

The answer to this question is not a hidden one. The characteristic features of a blanket policy are well understood. Its very essence is that it covers to its full amount every item of property described in it. If the loss upon one portion or item of the property exhausts the full amount of the policy, the whole insurance must be paid; there can be no apportionment of it. In the absence of a prorating clause, one blanket insurer among many insurers, whether blanket or specific, may be sued, and he must pay the whole loss if it is not in excess of his policy. His payment will give him certain equitable rights of contribution as against his coinsurers, but his legal obligation to pay the assured cannot be questioned. The contract holds him to that. These principles are elementary: 3 Joyce on Insurance, sec. 2492; 1 May on Insurance, 3d ed., sec. 13; Ostrander on Fire Insurance, sec. 204.

It is in such particulars as these that blanket policies differ from specific. The difference is one which inheres in the nature of the two contracts, and has its recognition in the accepted advantages of a blanket policy to the assured and its disadvantages to the insurer, and in the more exacting terms which are customarily demanded for its issue. The answer to our question must therefore be, that the whole amount insured by a blanket policy attaches, and invariably attaches, to each item thereunder,

The blanket insurers concede the peculiar character which ⁴⁰³ in general inheres in such policies, but they say that for the purpose of the contributing clause they are entitled to an apportionment of their insurance in cases of adjustment in connection with specific insurers. We fail to see anything in this claim

but an appeal from the contract to assumed principles of fairness and equity. It certainly does not rest upon any logical foundation. The palpable answer to it is found in the fact that the question is one of legal construction of an express contract obligation, and not of equitable determination. The parties having made a contract, the courts are powerless to change it. What the blanket insurers ask is, in effect, that there be read into their policies a provision which is not there. Had the parties wished, this provision might easily have been incorporated. It was not, and the contract must stand as made.

We have thus far discussed the question at issue as one of reason and not of authority. The analogous cases are few. They are, however, to be found. Concerning them, it has to be confessed that the majority which have arisen under the operation of the prorating clause have adopted the compound insurer's view. It is noticeable, also, that of these, all save a very few state the proposition as a dictum, or assume its correctness without argument or reason therefor. Such are the cases of *Blake v. Exchange Mut. Ins. Co.*, 12 Gray, 265, 272; *Cromie v. Kentucky etc. Mut. Ins. Co.*, 15 B. Mon. 432; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. 761.

In *Chandler v. Insurance Co. of North America*, 70 Vt. 562, 564, 41 Atl. 502, the court attempted to give a reason for this position. It is contained in these words only: "As by the terms of the specific policies they cannot be converted into blanket policies, it necessarily follows that the only way in which the loss can be adjusted is to turn the blanket policies into specific ones." This is a clear case of a non sequitur. The argument rests upon an assumed necessity which does not exist. It is practically as simple to adjust a loss by not apportioning as by apportioning the blanket insurance.

In *Ogden v. East River Ins. Co.*, 50 N. Y. 388, 10 Am. Rep. 492, the court ⁴⁰⁴ finds its reason in the fact that it was unreasonable to assume that any of the parcels included in the blanket insurance was overinsured, where the total insurance was not in excess of the total value. What method of adjustment this argument would have led the court to adopt had concurrent compound policies for different gross sums, all or part exceeding specific item valuations, been involved, was not stated. An assumption of such a situation sufficiently discloses the fallacy of the case.

Of all these cases, it is to be observed that none attempts to lay down a rule of universal or even general application. They

treat each case by itself, conceding that in the next the rule might not apply. The trouble has been that, in ignoring the contract, all has been left to arbitrary and uncertain action which fairness and equity in the given case seemed to dictate.

In *Page v. Sun Ins. Office*, 74 Fed. 203, the other side of this question is distinctly avowed. The decision is put squarely upon the terms of the contract. The argument, although brief, is substantially that which has guided us. The position assumed in the case last cited seems to have the approval of Joyce in his latest work: 4 *Joyce on Insurance*, sec. 3457. In *Sherman v. Madison Mut. Ins. Co.*, 39 Wis. 104, also, this doctrine receives at least implied sanction.

One other point remains to be considered. As the existence of the specific policies compels the adjustment of the loss by items, these items must be taken up in some order. This order might very materially affect the result, both as respects the companies and the insured; since that portion of a blanket policy which is exhausted in the settlement upon the first item no longer remains to be applied to the second item, and so on through the list. This matter of order is one upon which the policies in suit, and policies ordinarily, are silent. Evidently nothing remains but some arbitrary method of selection, in which the consideration influencing a choice should be what, on the whole, under the conditions, best satisfies the ends of fairness and justice as between the companies, the assured being given his rightful amount of indemnity. A little ⁴⁰⁵ study of the peculiar situations which may arise may convince one that no rule of universal and unvarying application can be safely laid down. Whether one suggests the order of the greatest losses, or of the least losses, or the order of the enumeration in the special insurance, or an order to be determined by lot, two at least of which methods appear to have been used, or some other order, he will quite likely be met with an assumed situation in which his system seems to fail to fully accomplish equity and justice. Fortunately we have no need to search for a universal rule. In the present case it matters not to the assured and little to the insurers, what order of adjustment is adopted. The order first indicated, to wit, that of the greatest losses, is one which, as a general rule, has some considerations in its favor. In this case it works out substantial equity and justice to all concerned. We therefore select it for the purposes of this case as on the whole the best.

The superior court is advised that in the adjustment of the plaintiff's loss and its apportionment among the defendant companies, the items upon which there was loss be taken up in the order of the greatest losses, the whole property being divided for this purpose into items corresponding to those designated in the specific insurance; that in computing the total amount of insurance upon the first item, the full amount of the blanket insurance be applied, and that the full amount of any given blanket policy be regarded as the amount of insurance upon the item under such policy; that with respect to the second and subsequent items the same rule be adopted, save that the total amount of insurance thereon be reduced by the amount of blanket insurance already exhausted in the settlement upon former items, and the amount of insurance under any given blanket policy likewise reduced by the amount thereof used in prior adjustments, and that judgment be rendered against the several defendants according to the results thus obtained.

In this opinion the other judges concurred.

The Rule of Apportionment laid down in the principal case seems opposed to *Ogden v. East River Ins. Co.*, 50 N. Y. 388, 10 Am. Rep. 492. For other decisions on this question, see the note to *Alliance Assur. Co. v. Louisiana Ins. Co.*, 28 Am. Dec. 123, 124; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 41 Am. St. Rep. 355, 37 N. E. 460. As to the right of contribution between insurers, see *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386, and cases cited in the cross-reference note thereto.

NEW HAVEN TRUST COMPANY v. DOHERTY.

[75 Conn. 555, 54 Atl. 209.]

CORPORATIONS—Director's Liability for Negligence.—A director of a corporation, when acting as its agent in the conduct of its business, may be personally responsible to it for his negligence or misconduct. (p. 241.)

CORPORATIONS—Liability of Directors.—Ordinarily directors in a corporation acting in good faith and within the scope of their authority are not liable for the disastrous consequences of a mere mistake of judgment, and their liability for negligence and misconduct in managing the affairs of the corporation must depend upon the terms of their agency and the particular circumstances of the case. (p. 241.)

CORPORATIONS—Liability of Director for Negligence.—If the directors of a life insurance company actively engaged in the management of its business and the investment of its funds, and presumably paid for their services, arrange for and carry out an ap-

propriation of the company's funds as a loan upon insufficient security and in violation of statute, their duty in respect to the loan is analogous to that of a trustee in respect to an investment of the trust fund in a manner unauthorized by the terms of the trust, and mere good faith is not sufficient to exempt them from personal liability. In such case they are bound to exercise diligence in investigating as to the values of the securities and safety of the loan and use ordinary care and prudence in acting on the facts known to them, and in failing to do so they act negligently and become personally liable for the resulting loss. (p. 242.)

CORPORATIONS—Liability of Director—Measure of Damage.—If the directors in a corporation actively engaged in the investment of its funds act negligently and wrongfully in investing them on insufficient security, the money and interest thus lost, as the direct result of the wrong, measure their personal liability. (p. 242.)

CORPORATIONS—Liability of Directors—Advice of Counsel. If the power of the directors of a corporation in dealing with its funds is doubtful, requiring some legal knowledge for the correct understanding of its limits, the directors may be entitled to some protection for their negligent acts when acting under the advice of counsel, but such advice cannot avail them where the terms of the power are plain and explicit. (p. 244.)

CORPORATIONS—Directors' Meetings.—No Presumption exists that a conference of a majority of the directors of a corporation is a regular board meeting, and that legal notice thereof has been given to the absent directors when no record of the conference has been made. (p. 245.)

CORPORATIONS—Liability of Directors—Evidence.—If the directors of a corporation having the active management of its funds, make a loan thereof upon insufficient security and in excess of their authority, resulting in a total loss, it is not incumbent upon the corporation suing therefor to prove the exact value of the securities at the time of the loan. (p. 245.)

H. Stoddard, W. H. Ely and L. F. Burpee, for the appellants.

H. C. White and L. M. Daggett, for the appellee.

558 HAMERSLEY, J. A director of a stock corporation, when acting for it in the conduct of its business, is its agent and, indirectly, the agent of all the shareholders. Like every agent, he may be personally responsible to his principal for negligence or misconduct in conducting the business intrusted to him. Ordinarily, directors acting in good faith and within the scope of their authority are not liable for the disastrous consequences of a mere mistake in judgment. But there is no general rule of liability for wrongful neglect in the exercise of such agency, applicable to directors as a class by themselves, independently of the law which prescribes and defines the duties and liabilities of agents. The duties and liabilities of directors must depend in each case upon the terms of their agency and the particular circumstances of the case. The fact that their services are gratuitous, when it is a fact, may have some weight. That they have

put themselves in the position of dealing, as directors, with ⁵⁵⁹ themselves as individuals, that the funds in their charge are not committed to them for ordinary business operations, but have been contributed to the corporation by others in the trust and confidence that they will be safely invested and preserved to meet the liabilities incurred to the contributors, and which must arise in the near or far-distant future (as in the case of savings banks and life insurance companies), that they act in excess of their authority or of the powers of the corporation, that they act in violation of the plain prohibition of statute law, together with other circumstances—may each affect the kind and degree of care required by law of a director in making or approving a particular investment, and his liability for any loss thereby caused.

In the present case the defendants were the principal officers of a life insurance company, actively engaged in its management and the investment of its funds, and presumably paid for their services. By virtue of their positions as principal officers they were also directors. As officers they arranged for and carried out, and as directors they approved and voted for, an appropriation of the company's funds as a loan upon insufficient security and in violation of section 2887 of the General Statutes of 1888 (Rev. 1902, sec. 3564), forbidding the making of any loan without taking the security therein prescribed.

Under these circumstances, the duty of the defendants in respect to the loan was analogous to that of a trustee in respect to an investment of the trust fund in a manner unauthorized by the terms of the trust. Mere good faith was not sufficient. At the very least they were bound to exercise diligence in investigating as to the value of the securities and safety of the loan, and ordinary care and prudence in acting on the facts known to them: *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 357, 50 Atl. 887, 74 Conn. 468, 474, 51 Atl. 130; *Allen v. Curtis*, 26 Conn. 456, 461; *State v. Washburn*, 67 Conn. 187, 34 Atl. 1034; *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131, 138, 23 Atl. 708; *Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866; *Lewin on Trusts*, 766; *Briggs v. Spaulding*, 141 U. S. 132, 147, 11 Sup. Ct. Rep. 924; *Hun v. Cary*, 82 N. Y. 65, 70, 71, 37 Am. Rep. 546.

The money in charge of the defendants as officers and ⁵⁶⁰ directors was, in view of the provisions of its charter, held by the corporation under limitations of investment analogous to those imposed by law upon a trustee in the investment of trust funds,

and, in recognition of this trust relation, the statute had further restricted the power of the trustee by forbidding any loan "unless such loan shall be secured by mortgage of unencumbered real estate worth at least double the amount loaned thereon; or by pledge of bonds or stocks as collateral, having a market value at least twenty-five per cent in excess of the amount loaned thereon; provided, however, that such life insurance company may make such loans upon pledge of United States government bonds, and bonds of the state of Connecticut at par."

The power of the corporation in the investment of its money, imbued for this purpose with the characteristics of a trust fund, was limited, and the authority of the defendants, as its agents, was likewise limited. In exceeding their authority by making the loan in question, under the circumstances of this case, the defendants surrendered the protection given them as agents acting in good faith within the scope of their authority, and assumed a personal responsibility to the corporation in respect to their unauthorized act. So far as they could be regarded as acting as agents, they were bound at least to exercise the diligence, care and prudence which a man of ordinary prudence would exercise, under such circumstances, to secure a loan whose actual safety would make their act in fact, as well as intention, beneficial to their principal. In making a loan which was actually unsafe, without exercising this diligence, care and prudence, they acted wrongfully and negligently, and became personally liable for the resulting loss; and the corporation had a right of action against them to recover the damage caused by their wrongful and negligent act. The action sounds in tort, and may properly be brought against any one or more of the officers and directors who may have incurred the personal liability.

The wrong which is the ground of this action consists in the unlawful appropriation of the plaintiff's money, whereby ⁵⁶¹ the same, and all beneficial use thereof, has been lost to the plaintiff. The amount of the money and interest so lost as the direct result of the wrong must, therefore, measure the damage. The acquirement of the indorsed note, mortgage, and bonds, was a part of the transaction which establishes the wrong, and if the company had in fact received any benefit from this acquirement, the amount of that benefit might go in reduction of damages; but, being worthless at the time the loan expired, and ever since, it is immaterial in this action whether or not the company or receiver has formally offered to hand over the worthless securities to the perpetrators of the wrong.

It is also immaterial what questions might arise had the receiver affirmed the wrongful act and accepted for the company the worthless securities; he has not done this; he could not do it without a violation of his duty, and such violation cannot be implied from the performance of his duty in bringing this action to recover the damage resulting from the wrong.

The questions now discussed were substantially covered by our opinion in granting a new trial of this cause upon a former appeal: *New Haven etc. Co. v. Doherty*, 74 Conn. 473, 51 Atl. 130.

The trial court properly applied the law thus indicated for its guidance in a new trial.

It follows that the court did not err in holding the defendants liable, notwithstanding it was proved and found by the court that they acted in good faith; and did not err in assessing the damages, or in refusing to hold that the difference between the amount of money appropriated to the loan and the market value at the time of the loan, of the bonds received as collateral security, was true measure of the damage caused by the wrong.

The disposition of these two grounds of error necessarily disposes of such other claims, under the assignments of error, as depend on the decision of the main question.

The claim is made that the court erred in drawing the conclusion of careless and negligent conduct from the subordinate facts found. This claim is unfounded. The conclusion ⁵⁶² is one of negligence under all the circumstances of the case, and is subject to the well-established rules governing any review of the action of a trial court in such case.

We have carefully examined the facts known to the defendants and upon which they acted, and other facts of the transaction as set forth in the finding. They certainly are not inconsistent with the conclusion drawn by the court, that the defendants did not exercise a reasonable degree of prudence and business judgment, but acted wrongfully and negligently. Counsel for the defendants cannot seriously complain of this conclusion, unless the fact that the defendants were acting beyond the scope of their authority is eliminated; but they claim that this fact should be eliminated because it appears that the defendants took the advice of counsel as to the power of the corporation to invest its funds in this loan, and were advised that it had power, and therefore the defendants were to be regarded as acting within their authority, and the standard of duty applied

to their conduct should have been that applicable to agents acting in good faith within the scope of their authority. The court properly overruled this claim.

The bonds were secured by a second mortgage on land, and the maker had no assets except the land so mortgaged. The bonds at par value were just equal to the amount loaned. The statute defining the power of the corporation over the investment of its quasi trust funds says that no loan shall be made unless secured by a first mortgage upon land worth twice the amount of the loan, or by the pledge of bonds as collateral having a market value at least twenty-five per cent in excess of the amount loaned. If this loan is treated as secured by mortgage on real estate, it is clearly unauthorized, because the mortgage is a second mortgage; if treated as secured by the pledge of bonds, it is clearly unauthorized unless the bonds had a market value of at least twenty-five per cent in excess of their par value because the bonds pledged have a par value just equal in amount to the loan.

The advice of counsel, as applicable to the loan in question, was this: The loan is within the power of the corporation ⁵⁶³ and authorized by the statute, if you believe in good faith that the land mortgaged to secure the bonds has a market value equal to the amount of the first and second mortgage and a sum equal to twenty-five per cent of the amount of the bonds pledged. It is true that where the power of a trust in dealing with a trust fund is doubtful, requiring some legal knowledge for the correct understanding of its limits, courts have held that the trustee might be entitled to some protection when acting under the advice of counsel. But the general principle is otherwise, and advice of counsel cannot avail where the terms of the trust are plain and explicit: *Lewin on Trusts*, 366; *Watts v. Girdlestone*, 6 Beav. 188, 190; *Ames v. Parkinson*, 7 Beav. 379. Indeed, it is difficult to imagine an instance of any kind where one charged with a specific duty can negligently violate that duty with impunity, by simply obtaining from some attorney advice which is obviously repugnant to the plain facts of the case.

The material facts not admitted, on which the judgment was founded, were properly found under the issues framed by the allegations and denials of the complaint, amended answer, and reply.

The court did not err in overruling the defendants' claim that there was a fatal variance between the pleadings and the proof. Nor did it err in holding, if that ruling can be regarded

as material, that no presumption exists that a conference of a majority of the directors is a regular board meeting, and that legal notice has been given to the absent directors, when no record of the conference has been made. There may be a presumption in support of a record produced in evidence, in the absence of testimony to the contrary, that a meeting duly recorded was rightly called. But there is no presumption that directors do not confer except at a regular board meeting. When a majority of directors confer, the inference from the fact that the conference was not recorded, that other directors were not notified to attend, is as permissible as an inference, from the fact of the unrecorded conference, that they were notified to attend.

564 The plaintiff having proven that the defendants made a loan upon insufficient security and in excess of their authority, resulting in total loss, the court did not err in refusing to hold that it was incumbent upon the plaintiff to prove the exact value of the securities at the time of the loan.

The court did not err in refusing to divide the loan into two separate loans and treat the whole of the collateral as security for one of these loans, for the purpose of affecting the rule of damages, or for any purpose.

The appeal contains numerous claims for the correction of the finding. It needs no correction. The printed transcript of testimony included in the appeal record serves only to illustrate the exceeding fairness and substantial sufficiency of the finding. An inspection of the whole record fails to show any material fact found without evidence, or that any fact claimed is excluded from the finding which is material to the presentation of questions of law and has been found proven by the court or treated in the trial as an admitted or undisputed fact.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

The Liability of Directors of a Corporation to its creditors for negligence in the management of the affairs of the company, and the degree of care which law exacts of them in order to escape personal liability for the adverse consequences of business transactions, are considered in the monographic notes to *Hodges v. New England Screw Co.*, 53 Am. Dec. 637-651; *Marshall v. Farmers' etc. Sav. Bank*, 17 Am. St. Rep. 95-101; *Greenberg v. Whitecomb Lumber Co.*, 48 Am. St. Rep. 927, 928. They must exercise ordinary care, skill, and diligence. They must give to the business such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is incumbent on them to devote so much of their time to their trust as is necessary to familiarize themselves with the business of the institution and direct its operation. But if, while acting in good faith and with reasonable care and skill,

they nevertheless fall into a mistake causing financial loss, they cannot be held answerable therefor: *Warren v. Robison*, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 734, and cases cited in the cross-reference note thereto; *Wilson v. Stevens*, 129 Ala. 630, 87 Am. St. Rep. 86, 29 South. 678.

The Directors of a Corporation are said to be charged with the duties of trustees, and to be bound to care for its property and manage its affairs in good faith, and to be accountable in equity the same as other trustees for a violation of these duties resulting in waste of its assets, injury to the property, or unlawful gain to themselves: *Bosworth v. Allen*, 168 N. Y. 157, 85 Am. St. Rep. 667, 61 N. E. 163; *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153, 64 Pac. 692, 69 Pac. 77.

NORWALK HEATING AND LIGHTING COMPANY v. VERNAM.

[75 Conn. 662, 55 Atl. 168.]

NUISANCE—Ouster—Easement.—The erection and maintenance of a structure projecting over the land of another is an invasion of his legal rights, which, if continued long enough under a claim of right, may ripen into an easement, but it is not an ouster of possession. (p. 247.)

NUISANCE—Injunction to Remove.—The erection of a structure projecting over the land of another is a nuisance which the latter may himself remove or apply for a mandatory injunction against its further wrongful continuance, and the absence of a direct assertion of right by the person maintaining such structure is not a bar to the right to such injunction. (p. 247.)

L. Warner, for the appellants.

J. B. Hurlbutt, for the appellee.

663 **BALDWIN, J.** The plaintiff owns certain land, which is substantially covered by the waters of the Norwalk river. The defendants own adjoining land on the river bank, having a brick building upon it extending to the boundary line. To this building they have attached a wooden structure, supported by beams resting on its foundation walls, which is ten feet wide and nineteen feet deep, and projects over the plaintiff's land without touching it. The plaintiff's title rests on a conveyance made after this structure was completed. It has requested the defendants, who are occupying it by tenants as part of a store, to remove it, and they have refused. It desires to build on its premises, and this structure prevents it from doing so, and interferes with its use of its land.

The complaint states substantially this case, and has been found true.

It is contended that the conveyance to the plaintiff was void, because given when its grantor was ousted of possession: Gen. Stats. (Rev. 1902), sec. 4042. The court of common pleas properly held that the possession of the projecting structure at that time by the defendants was no interference with the possession by the plaintiff's grantor of the ⁶⁶⁴ premises over which it projected. The construction and maintenance of such a structure, like the construction and maintenance upon a house of eaves overhanging another's land, is an invasion of right, but not an ouster of possession: *Randall v. Sanderson*, 111 Mass. 114. The possession of the adjoining proprietor remains unaffected, except that it is rendered less beneficial. The possession and occupancy of the projecting structure has no effect on the ownership of the soil beneath, unless it be maintained under a claim of right for fifteen years, and so should ripen into a perpetual easement.

It follows that equitable relief was properly claimed and granted. While the plaintiff might have itself removed the nuisance, without appealing to the courts, it was not restricted to reliance upon self-help. Nor had it only a right of action for damages. An injunction might originally have been brought by the plaintiff's grantor to prevent the construction of the projection. This not having been done, the plaintiff could ask for a mandatory injunction to prevent its wrongful continuance.

It is found that the defendants made this addition to their building without knowing that they had a right to do so, and in order to provoke a determination of that question by legal proceedings. While this absence of a direct claim of right might be material, were the question one as to their having gained an easement by an adverse user for fifteen years, it does not affect the plaintiff's cause of action in this proceeding. They cannot defend on the ground that they did not in fact make a claim which it would be naturally inferred from their acts that they were making.

There is no merit in the exceptions taken to the finding
There is no error.

In this opinion the other judges concurred.

The Owner of Land may maintain an action against an adjoining owner for erecting a bay-window so as to extend over his land, although that portion of the land has been laid out and is used as a highway: *Codman v. Evans*, 5 Allen, 308, 81 Am. Dec. 748. If one

projects his eaves over the premises of his neighbor, and continues it for a sufficient length of time, he acquires an easement or servitude: *Vincent v. Michel*, 7 La. 52, 26 Am. Dec. 496; *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294, 34 Am. St. Rep. 706, 25 Atl. 1120. But it seems that he acquires no title to the land under the eaves: *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80. Compare the note to *Carbrey v. Willis*, 83 Am. Dec. 694, 695.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

STRODE v. STRODE.

[6 Idaho, 67, 52 Pac. 161.]

DIVORCE—Service by Publication.—If, in a suit for divorce, the record fails to show that a copy of the summons was sent to the defendant, when the order directs that to be done, the service by publication is not complete, and does not give the court jurisdiction. (pp. 253-255.)

JURISDICTION.—The Mere Fact that a Defendant has Knowledge of a suit pending against him is not sufficient to give the court jurisdiction; notice, as required by law, must be given, or his voluntary appearance shown. (p. 254.)

JURISDICTION.—When Service by Publication is relied upon, the judgment-roll should show on its face that every act required by law has been substantially complied with, or the judgment is void. (p. 255.)

JURISDICTION—Service by Publication.—A Court is not authorized to enter judgment, when service is by publication, until proof of a substantial compliance with the law as to publication and mailing of summons is made and filed with the clerk of court. (p. 255.)

Hawley & Puckett, for the appellant.

W. E. Borah, for the respondent.

69 SULLIVAN, C. J. This is an action for divorce on the ground of cruelty. The defendant answered the complaint denying the allegation of cruelty, and by cross-complaint asked that the marriage between himself and the plaintiff be annulled, for the reason that the plaintiff had a husband, from whom she had not been divorced, living at the time of the intermarriage of plaintiff and defendant. The trial court found that the charge of cruelty was not supported by the evidence, and also found that the allegations of the cross-complaint were true, and entered judgment and decree annulling the marriage as prayed for

in the cross-complaint. A motion for a new trial was made by the plaintiff (appellant here), and overruled by the court. This appeal is from said order denying a new trial and from the judgment.

Numerous errors are specified, but, in our view of the case, it is only necessary to review those findings of fact on which the conclusion of law is based that the decree of divorce entered in the case of Deeds against Deeds was a nullity. The facts are substantially as follows: On the fourth day of July, 1880, the plaintiff married one Rufus M. Deeds at the town of Blanchard, in the state of Iowa. The plaintiff and her said husband, Deeds, came to Idaho in 1881; resided in Idaho until 1885; then went to Oregon, and returned to Idaho in 1886; and in 1888 returned to Oregon, and resided at Eugene, or near there. The plaintiff and her said husband separated in the spring of 1890. Plaintiff then went to the city of Portland, and engaged in the real estate business. On the fifth day of January, 1892, she returned to Boise City, Idaho; and on the second day of February, 1892, began a suit in the district court of Ada county to obtain a divorce from her said husband, Deeds. In the complaint she alleged, in substance, that she had been a resident of the state of Idaho since 1881, the marriage of herself and the defendant, Rufus M. Deeds, extreme cruelty as the grounds for divorce. ⁷⁰ A summons was duly issued on said second day of February, and returned and filed on the fourth day of said month. The return thereon recited that the defendant, Rufus M. Deeds, could not be found in Ada county. Thereupon service was attempted to be made by publication. The affidavit for service of the summons by publication, made by the plaintiff in that case, is as follows:

“State of Idaho, }
County of Ada. } ss.

“Flora A. Deeds, being first duly sworn, on her oath deposes and says that she is the plaintiff in the above-entitled action; that the complaint in said action was filed February 2, 1892, with the clerk of said court, and summons was thereupon issued; that said action is brought to dissolve the bonds of matrimony now existing between plaintiff and defendant; that the cause of action is fully set forth in plaintiff's verified complaint on file herein; that said defendant is now out of this state, and cannot, after due diligence, be found therein; that this affiant has inquired of the friends and acquaintances of the defendant,

to wit, Mrs. A. Jane Williams, Mr. Frank C. Bond, David Spiegel and H. P. Nelson, as to the whereabouts of the defendant, and none of them know his present place of residence, unless it be Portland, Oregon; that when he (the defendant) left Boise valley he stated to his said friends that he was going to Portland, Oregon; that he went there, but as to whether he is there at the present time they have no knowledge, but that, if he had returned to this state, they, his friends, would have known of his return. This affiant therefore says that the defendant is not in this state, and that personal service of summons cannot be had on said defendant, Rufus M. Deeds, within this state, and prays for an order that service of the summons may be made by publication.

FLORA A. DEEDS.

"Subscribed and sworn to before me this 18th day of February, A. D. 1892.

CHAS. A. CLARK,

"Notary Public."

Upon reading and filing said affidavit, Honorable E. Nugent, judge of the district court of said Ada county, made an order ⁷¹ directing that service of said summons be made by publication of the summons in the "Idaho Democrat," a newspaper published in Boise City, Idaho, and also directed that a copy of the summons and complaint in said suit be deposited in the post-office at Boise City, Idaho, postage prepaid, and addressed to said defendant, Rufus M. Deeds, at Portland, Oregon. Said order was made on the nineteenth day of February, 1892. On the second day of December, 1892, said court made and filed the following judgment and decree of divorce:

"Be it remembered that on the second day of December, 1892, the same being the fifth judicial day of the third judicial court of the state of Idaho in and for Ada county, November term, the Honorable Edward Nugent, sole judge presiding, this cause of action coming on for hearing, the plaintiff appearing by her attorney, D. T. Miller, and though the defendant having been duly served with due, legal and timely service with the original summons issued out of said court, of the pendency of this action, appeared not, and it was therefore ordered and adjudged that defendant be declared in default for not answering, which was duly entered. And be it further remembered that on said day, this cause of action coming on for further and final hearing on the complaint filed therein, and the proof thereof and the court having been first fully advised of the allegations in plaintiff's complaint and hearing the testimony in support thereof, and all and singular the law and the premises, being by the court

here understood and fully considered, finds for the plaintiff and against the defendant. Wherefore it is here ordered, adjudged and decreed, and this does order, adjudge and decree that the marriage between the said plaintiff, Flora A. Deeds, and the defendant, Rufus M. Deeds, be dissolved, and the same is hereby dissolved, and the plaintiff, Flora A. Deeds, is freed and absolutely released from the bonds of matrimony, and all obligations thereunder, and restored to all the rights and privileges of an unmarried woman; and it is further ordered, adjudged and decreed that the custody and control of the minor child of said marriage, Flora L. Deeds, age nine (9) years, be, and the same is hereby, awarded to the plaintiff, Flora A. Deeds. Done in open court this second day of December, 1892.

“E. NUGENT,

“Judge.”

72 The decree recites that the defendant, Deeds, had been duly served with the original summons, and appeared not, and thereupon defendant was adjudged to be in default for not answering, and default was entered against him, and, after hearing the evidence offered by the plaintiff, a decree of divorce was entered in her favor. The record shows that the original summons was placed in the hands of the sheriff of Ada county for service on the third day of February, 1892, and returned on the fourth day of February, 1892, with the indorsement of the sheriff thereon stating that, after due and diligent search, he was unable to find the defendant therein named within Ada county. Thereafter, on the nineteenth day of February, the judge made the order directing that service of the summons be made by publication. The record contains the affidavit of the publisher of the newspaper named in said order, wherein he stated that the summons was published in said newspaper at least once a week for one month, commencing on the twenty-first day of February, and ending on the twenty-third day of March, 1892. The record fails to show that a copy of the summons and complaint was sent to the defendant, Deeds, as required by said order of publication of summons; also fails to show that an alias summons was issued after the original summons had been returned as aforesaid.

It is admitted by counsel for the appellant that said affidavit on which the order for service of summons by publication was made, was false in some of its allegations; that it was false as to the allegations or statements as to the residence and post-office address of her said husband, Deeds; but they contend that

said false statements were unintentional, and did not result in depriving Deeds of the knowledge of the fact that said divorce suit was pending, and that Deeds had actual notice of the pendency of said action.

Under the provisions of section 2469 of the Revised Statutes of Idaho, a suitor for a divorce must be an actual resident of the state for a period of at least six months next preceding the commencement of the action therefor. The evidence shows that the appellant resided in the state of Oregon from 1888 to the fifth day of January, 1892, when she returned to this state, and ⁷³ commenced said suit against her said husband, Rufus M. Deeds, on the second day of February, 1892. After residing in Oregon for four years she returned to this state, and had resided here less than thirty days at the time of the commencement of said divorce suit. The evidence shows that she knew that her said husband's postoffice address was Eugene, Oregon, and that she deposed, in said affidavit for publication of summons, that she had inquired of certain persons, naming them, as to the whereabouts of her said husband, and that none of them knew his then place of residence, unless it was at the city of Portland, state of Oregon. The proof of service of summons fails to show that a copy of the summons and complaint were mailed to the defendant, as required by said order.

It is contended by respondent that said decree of divorce is void and a nullity, for the reasons: 1. That the appellant had not been a resident of this state more than thirty days prior to the commencement of said suit, whereas by the provisions of said section she was prohibited from bringing said suit until she had resided in the state six months; 2. That she perpetrated a fraud on the court by making a false affidavit in procuring an order for the service of summons by publication; 3. That after the return of the original summons, showing that the defendant could not be found in said Ada county, no alias summons was issued (the publication of summons having been made from a copy), and that no live process was in existence after the return of the original summons, and for those reasons the court never had jurisdiction of the said defendant, Rufus M. Deeds, and had no jurisdiction to enter said judgment and decree for divorce.

We think said contentions of respondent are sustained by the record. The defendant Deeds did not voluntarily appear in said case, and the attempted service of summons by publication utterly failed to confer jurisdiction on the court. Under subdivision 1, section 4456 of the Revised Statutes of Idaho, the

judgment-roll, in cases like the one at bar, consists of the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. In the case at bar the judgment-roll in the said case of **74** Deeds against Deeds was introduced in evidence, and it contains no proof of the service of summons by publication or otherwise, and the evidence shows, as a matter of fact, no service by publication was made. That being true, the court had no jurisdiction to enter judgment and decree in said case of Deeds against Deeds, and the decree therein was absolutely void for want of jurisdiction. The mere fact that a defendant has knowledge of a suit pending against him is not sufficient to give the court jurisdiction. Notice, as required by law, must be given, or the voluntary appearance of the defendant shown, in order to give jurisdiction. In *Roberts v. Roberts*, 3 Colo. App. 6, 31 Pac. 941, it is said: "All the steps which the statute prescribes must not only be followed, but proven, to confer jurisdiction on the court over the absent defendant." In *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621, the court says: "The rule in such cases [service of summons by publication] seems to be that the record must show essentially all the jurisdictional facts. . . . It follows, therefore, that the record in this case should have affirmatively shown a compliance with the statutory provisions relating to forwarding the process by mail. This it failed to do, and the omission is fatal to the jurisdiction of the court below": See, also, *State v. Superior Court*, 6 Wash. 352, 33 Pac. 827. In *Schart v. Schart*, 116 Cal. 91, 47 Pac. 927, it was held that service by publication on nonresidents, whose address is known, is not complete until copies of the summons and complaint are mailed to them, as required by the order of publication. In *Lewis v. Lewis*, 15 Kan. 181, Justice Brewer, speaking for the court, and commenting on that section of the Kansas statutes authorizing service of summons by publication, and referring to each act required to be done by the provisions of said section, says: "Now, this is a part of the service; without it no decree can be properly entered. It is a precaution ordered by the legislature to guard against the danger of decreeing a divorce without the knowledge and presence of both parties. It may be very inadequate, but it is worth something. It is a step in the right direction. But, whether adequate or not, it is the legislative direction and as such may not be disregarded." Nothing short of a substantial compliance with the prerequisites.

75 of the statute authorizing service of summons by publication will give jurisdiction. The judgment-roll should show on its face that each and every act required by law had been substantially complied with, or the judgment must be treated as void: *Vermont etc. Trust Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104. A court is not authorized to enter judgment and decree, in cases where service of summons is made by publication, until proof of a substantial compliance of the law as to publication of summons and mailing of summons and complaint is made and filed with the clerk of the court. In *Crouch v. Crouch*, 30 Wis. 667, a case in some particulars very much like the one at bar, the court said: "But the order and judgment are void for another reason. It is a verity in this case that, when the plaintiff made the affidavit upon which the order of publication was granted, she knew the residence or stopping place of the defendant; she also knew where he was when she testified before the referee. Yet she studiously concealed these facts from the commissioner and the court, for the evident purpose of obtaining a judgment of divorce without the knowledge of the defendant." Upon a careful examination of the evidence, we are of the opinion that the plaintiff would not have been entitled to a divorce had no defense been made on the ground of the nullity of the decree of divorce between plaintiff and her husband, Deeds. Under the provisions of section 2471 of the Revised Statutes, no divorce can be granted upon the uncorroborated testimony of the parties. The evidence of the plaintiff on the allegation of cruelty is uncorroborated, and in fact contradicted by several witnesses. The judgment of the court below is affirmed. The respondent is ordered to pay the costs of this appeal.

Huston and Quarles, JJ., concur.

If Constructive Service of process is relied upon to sustain a judgment, there must have been a strict compliance with the statute: *Coffin v. Bell*, 22 Nev. 169, 58 Am. St. Rep. 738, 37 Pac. 240; *Thomas v. Thomas*, 96 Me. 223, 90 Am. St. Rep. 342, 52 Atl. 642; *Gilmore v. Lampman*, 86 Minn. 493, 91 Am. St. Rep. 376, 90 N. W. 1113. When the summons is directed to be mailed to the defendant at a place named in the order for service, such mailing is a substantial part of the service, and, if omitted, a judgment based on publication alone is void: See the monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 495. As to the effect of mailing the summons to the wrong place, see *Hunter v. Ruff*, 47 S. C. 525, 58 Am. St. Rep. 907, 25 S. E. 65.

CHRISTENSEN v. HOLLINGSWORTH.

[6 Idaho, 87, 53 Pac. 211.]

A MORTGAGE may be Reformed and Foreclosed in the same action. (p. 257.)

MARRIED WOMEN—Reformation of Mortgage.—A mistake in the description of land intended to be mortgaged by a married woman may be corrected on a proper showing. (p. 258.)

MARRIED WOMEN—Acknowledgment of.—A substantial compliance with the statute, in the certificate of acknowledgment of a married woman, is all that is required. (p. 258.)

JURY TRIAL—Right to.—The Guaranty in the Constitution of Idaho that the right of trial by jury shall remain inviolate is not intended to extend the right but simply to secure it as it existed at the date of the adoption of the constitution. (p. 259.)

JURY TRIAL—Right to, in Equity Cases.—A constitutional guaranty that the right to trial by jury shall remain inviolate has no reference to equity cases. (p. 259.)

George W. Goode, for the appellant.

Sweet & Steele, for the respondent.

90 SULLIVAN, C. J. This action was brought by the respondent, Christensen, to reform and foreclose a certain real estate mortgage given to secure certain promissory notes. The answer denies the execution of said mortgage, and, as another and separate defense, avers that the defendants (who are appellants here) are, and were at the date of the execution of said mortgage, husband and wife, and that they occupied the premises described in the complaint as a residence; that the same was community property; and that the acknowledgment of the execution of said mortgage by the said Mary E. Hollingsworth was not taken as required by the provisions of section 2956 of the Revised Statutes of Idaho, in that she was not made acquainted with the contents of said mortgage by the officer taking the acknowledgment, on an examination without the hearing of her husband; and that said mortgage is void for that reason. When the cause was reached for trial, the appellants demanded that the issues of fact be tried by a jury, which was denied by the court. Trial was had to the court without a jury, and judgment and decree of reformation and foreclosure were made and entered in favor of the respondent. Thereupon, a motion for a new trial was interposed by the appellants, and overruled by the court. This appeal is from the judgment and the order overruling the motion for a new trial.

The admission of any evidence sustaining the allegations of the complaint touching the reformation of the mortgage is assigned as error. It is contended that the allegations of the complaint are not sufficient, in this, to wit: It fails to allege mutual mistake, with all of its attendant circumstances, and fails to allege that such mistake was not through the negligence of the plaintiff. While the allegations are not as full and complete as the facts, as shown by the evidence, would warrant, we think they are sufficient to allow the introduction of testimony to show whether it was the intention of the defendants to include said eighty-acre tract of land in said mortgage, and show whether the omission of the number of the section in which said tract was situated was omitted from said description through mistake of the person who drew said mortgage.

⁹¹ It is contended that a mortgage cannot be reformed and foreclosed in the same action, and that the court erred in permitting reformation and foreclosure in the same action. There is nothing in this contention. The recognized rule under our Code of Civil Procedure is that a mortgage may be reformed and foreclosed in the same action. In *Hutchinson v. Ainsworth*, 73 Cal. 453, 2 Am. St. Rep. 823, 15 Pac. 82, it is held that a complaint which seeks to reform a mortgage, and to foreclose the same as reformed, states but one cause of action: See, also, *Bliss on Code Pleading*, secs. 166-172.

It is also contended that no reformation of an instrument can be had against a married woman, especially when such reformation is for the purpose of compelling her to convey more property than the instrument already conveys. The mortgage in question was executed on the twenty-seventh day of November, 1893, and contains descriptions of three distinct parcels or tracts of land. The alleged mistake occurs in the first description, which describes an eighty-acre tract, except that it fails to state the number of the section in which said tract is situated. In a subsequent mortgage given by these appellants to the Plano Manufacturing Company on the eleventh day of May, 1894, they admitted that said eighty-acre tract was included in the mortgage involved in this action. Under all of the evidence found in the record, it is clearly shown that it was the intention of the defendants to include said eighty-acre tract in said mortgage, and through the mistake of the draftsman the number of the section was omitted. By the reformation of said mortgage no new right is conferred. It is merely carrying into effect the intention of the parties. If such mistake

could not be corrected, gross injustice would result. Equity looks on that as done which ought to be done. The object and policy of our statutes in regard to the transfer or conveyance of the separate property of the wife, or of the property on which the husband and wife may reside, are not controverted or thwarted by permitting such reformation: *Savings & Loan Society v. Meeks*, 66 Cal. 371, 5 Pac. 624; *Hayford v. Kocher*, 65 Cal. 389, 4 Pac. 350. A mistake in the description of land intended to be conveyed or mortgaged by a married woman may be corrected upon a proper showing: *Hamar v. Medsker*, 60 Ind. 413; *Carper v. Munger*, 62 Ind. 481; *Jones on Mortgages*, 3d ed., sec. 99; *Dembitz on Land Titles*, sec. 54; *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947. It is contended that the certificate of acknowledgment to said mortgage is defective, and not in compliance with the provisions of section 2960 of the Revised Statutes. The certificate is as follows:

"State of Idaho, }
County of Latah. } ss.

"I, J. I. Mitcham, justice of the peace in and for said county, in the state aforesaid, do hereby certify that A. P. Hollingsworth and Mary E. Hollingsworth, his wife, personally known to me as the real persons whose names are subscribed to the foregoing deed, appeared before me this day in person, and acknowledged that they executed and delivered the said deed, as their free and voluntary act, for the uses and purposes therein set forth. And I further certify that Mary E. Hollingsworth, wife of said A. P. Hollingsworth, acknowledged to me, on an examination apart from, and without the hearing of, her husband, and after I had made known to her the contents of said instrument, that she executed the same freely and voluntarily, without fear or compulsion, or under influence of her husband, and that she did not wish to retract the execution of the same. Given under my hand and official seal this twenty-seventh day of November in the year of our Lord, 1893.

"J. I. MITCHAM,
"Justice of the Peace."

Said certificate does not follow in the exact words of the statute, nor is it necessary that it should be so. A substantial compliance with the provisions of said section is all that is required, and we think said certificate substantially complies therewith: *Northwestern Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764.

It is contended, under the provisions of section 7, article 1,

and section 1, article 5, of the constitution of Idaho, that the defendants were entitled to have the issues of fact tried by a jury, and that the court erred in denying appellants' motion for a jury trial. Section 7, article 1, is as follows: "The right of trial by jury shall remain inviolate; but in civil actions three-fourths ⁹³ of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanor, five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court." Section 1, article 5, is as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are hereby prohibited; and there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the state as a party against a person charged with a public offense for the punishment of the same, shall be termed a criminal action. Feigned issues are prohibited, and the fact at issue shall be tried by order of the court before a jury." Said section 7, article 1, of the constitution, declares, *inter alia*, that "the right of trial by jury shall remain inviolate"; and section 1, article 5, declares: "The distinction between actions at law and suits in equity, and the forms of all actions and suits, are hereby prohibited," etc. It is the settled doctrine in a number of states having constitutional provisions similar to those above cited that those provisions must be read in the light of the law existing at the time of the adoption of the constitution. Said provisions were not intended or designated to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution: *City Council v. O'Donnell*, 29 S. C. 355, 13 Am. St. Rep. 728, 7 S. E. 523; *Lynch v. Metropolitan etc. Ry. Co.*, 129 N. Y. 274, 26 Am. St. Rep. 523, 29 N. E. 315; *Heacock v. Hosmer*, 109 Ill. 245; *Commercial Ins. Co. v. Scammon*, 123 Ill. 604, 14 N. E. 666; *Ex parte Schmidt*, 24 S. C. 363. The guaranty that "the right to trial by jury shall remain inviolate" has no reference to equitable cases: *Flaherty v. McCormick*, 113 Ill. 538; *Ward v. Farwell*, 97 Ill. 593; *Heacock v. Hosmer*, 109 Ill. 245. ⁹⁴ This

being an equitable action, it was not error to deny defendant's application for a jury trial.

We have made a careful examination of each error assigned, and find no error in the record. The judgment and decree of the trial court are therefore affirmed, with costs of this appeal in favor of the respondent.

Huston and Quarles, JJ., concur.

A Mortgage may be Reformed in a foreclosure suit: *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82. See, too, *Snyder v. Partridge*, 138 Ill. 173, 32 Am. St. Rep. 130, 20 N. E. 851; *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15.

The Reformation of Deeds of Married Women is considered in the monographic note to *Williams v. Hamilton*, 64 Am. St. Rep. 511-514.

The Acknowledgment of a Married Woman need not literally comply with the statute; a fair compliance is sufficient: *Frederick v. Wilcox*, 119 Ala. 355, 72 Am. St. Rep. 925, 24 South. 584; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932. See the monographic note to *Jerdee v. Furbush*, 95 Am. St. Rep. 904.

A Jury Trial in equity cases is not guaranteed by the provisions of state constitution in respect to the right of trial by jury, unless specially named: *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138; *Lynch v. Metropolitan etc. Ry. Co.*, 129 N. Y. 274, 26 Am. St. Rep. 523, 29 N. E. 315.

BURBANK v. KIRBY.

[6 Idaho, 210, 55 Pac. 295.]

A HOMESTEAD Right can be Secured Only by a substantial compliance with the provisions of the statute. (p. 262.)

HOMESTEAD—Defective Acknowledgment.—If a married woman files a declaration of homestead upon community property, which is not acknowledged and certified as required by statute, a homestead is not created, and after an execution sale and a sheriff's deed thereunder, it is too late to ask for a reformation of the acknowledgment in an action by the grantor in such deed to recover possession of the property. (p. 262.)

Forney, Smith & Moore, for the appellant.

James E. Babb and George W. Coutts, for the respondents.

212 HUSTON, J. Plaintiff having recovered a judgment in the district court against defendant Thomas Kirby, issued execution thereon, and levied upon, and sold thereunder, certain real estate of said defendant. Having received a sheriff's deed of the real estate, plaintiff made demand of possession of the prop-

erty of defendant, and, possession being refused by the defendant, plaintiff brought this action to recover possession. Judgment in the first action was taken by default after personal service, no appearance having been made in said action by defendant. To this action defendants appear, and set up as a defense that prior to the levy of the attachment and recovery of judgment by plaintiff against the defendant Thomas Kirby, the defendant, May Kirby, as the wife of the said Thomas Kirby, had filed a declaration of homestead upon the real estate in question, and that by reason thereof said real estate was not subject to levy and sale. The real estate in question was community property. It is claimed by plaintiff that the declaration of homestead filed by said defendant, May Kirby, as wife of defendant, Thomas Kirby, not having been acknowledged, as required by the statute of Idaho, the same was void and inoperative, and did not constitute a homestead under the statutes of this state. Section 3070 of the Revised Statutes of Idaho is as follows: "In order to select a homestead, the husband or other head of the family, or in case the husband has not made such selection, the wife must execute and acknowledge in the same manner as a conveyance of real property is acknowledged, a declaration of homestead and file the same for record." Section 3073 provides that: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead." It is palpable that the declaration of homestead relied upon by the defendants in this case was not, as shown by the certificate of the ²¹³ notary, acknowledged, as required by statute. Section 2971 of the Revised Statutes of Idaho is as follows: "When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate." The statutes we have quoted were copied from those of California, and before their adoption by Idaho had been repeatedly passed upon and construed by the supreme court of the former state. In *Kennedy v. Gloster*, 98 Cal. 143, 32 Pac. 911, following *Beck v. Soward*, 76 Cal. 527, 18 Pac. 650, the court says: "The certificate must be attached to the declaration, and the paper may then be filed for record, and constitute a homestead; but, if the certificate is not made in substantial conformity to the requirements of the statutes, the paper is not entitled to record, and if filed and recorded, it will not constitute a homestead." Accepting the construction of the statute as given by the supreme court of California, we must

conclude that at the time the attachment by plaintiff was levied, at the time he recovered judgment, at the time of the sale under execution, and the making and delivering of a deed by the sheriff, no homestead existed on the lands in question.

But it is claimed by counsel for defendants that, as the acknowledgment was properly taken, and that the defect in the certificate arose from an oversight on the part of the notary, the defendants are entitled to have said certificate reformed in this action, and that such reformation shall relate back to the time of the filing for record of the declaration of homestead. We cannot agree with this contention. We have examined all of the authorities accessible cited by counsel in support of his position, and find that without exception they apply to cases of conveyances. A homestead is not a conveyance. It possesses none of the essential requisites of a conveyance. There is neither grantor, nor grantee, nor consideration in a declaration of homestead. There is no transfer of, or change in, the title. It is the act of the owner of the property, whereby such owner secures a right or privilege given him by the statute, and which is in derogation of the common law and common right, and which can only be secured by a substantial compliance with the provisions of the ²¹⁴ statute, conditions precedent to the investiture of the property with the exceptional character contemplated. If the title to the property passes from the owner by due and proper proceedings in the course of law, he cannot, after such title has vested in another, defeat it by establishing a homestead *nunc pro tunc*. The declaration of homestead was prepared, executed, and acknowledged on the 10th of August, 1893. On the third day of November, 1893, it was filed for record. On February 15, 1894, plaintiff commenced his action, and issued attachment, and levied the same upon the property in question; and on March 31, 1894, judgment was entered against the defendant Thomas Kirby and in favor of plaintiff. On August 26, 1894, execution was issued on the judgment, and on November 12th sale was had, and certificate of sale and sheriff's deed were thereafter executed and delivered to plaintiff. Defendants had six months and over after the execution of the declaration of homestead in which to have the defective certificate of acknowledgment corrected as provided in section 2971 of the Revised Statutes, or to file a new and proper declaration, and did not avail themselves of either remedy. Judgment of district court is reversed, with costs to appellant.

Sullivan, C. J., and Quarles, J., concur.

That a Declaration of Homestead must be in compliance with the statute, in order to be effective, see Cunha v. Hughes, 122 Cal. 111, 68 Am. St. Rep. 27, 54 Pac. 535; Reid v. Englehart-Davidson Mercantile Co., 126 Cal. 527, 77 Am. St. Rep. 206, 58 Pac. 1063.

DEEDS v. STRODE.

[6 Idaho, 317, 55 Pac. 656.]

ILLEGAL MARRIAGE--Communication of Venereal Disease.

If a woman, whose divorce from her husband is invalid, marries another man, who inoculates her with a venereal disease, she has no right of action against him therefor, he having practiced no deception in inducing her to marry him. (p. 267.)

Hawley & Puckett and E. J. Dockery, for the appellant.

W. E. Borah, for the respondent.

318 HUSTON, J. This is an action for damages brought by the plaintiffs, husband and wife, against the defendant. A demurrer was interposed by the defendant to the complaint of **319** the plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and from the judgment entered thereon this appeal is taken.

This action is brought by and for the benefit of the plaintiff, Flora A. Deeds. The complaint states that said Flora A. and her said husband "have, by mutual agreement and understanding, lived separate and apart from each other for more than seven years last past," and "that plaintiff Rufus M. Deeds is made a party hereto by reason of his being the husband of the plaintiff, Flora A. Deeds, and for that reason only." The complaint further states that in the year 1890, at the town of Eugene, in the state of Oregon, plaintiff, Flora A. Deeds, and her said husband, Rufus M., separated, and have since that time lived separate and apart from each other; that in February, 1892, the plaintiff, Flora A. Deeds, commenced suit in the district court for Ada county, Idaho, against her said husband to procure a divorce; that such proceedings were had in said suit, that on the twenty-second day of December, 1892, a judgment and decree were entered in said court pretending to grant a decree of divorce to said plaintiff, Flora A. Deeds, from the said Rufus M. Deeds; that on the thirty-first day of October,

1893, at Boise City, in Ada county, Idaho, the plaintiff, Flora A. Deeds, believing, by reason of the judgment and decree hereinbefore referred to, that she was a single woman, and no longer the wife of plaintiff, Rufus M. Deeds, at the solicitation and request of the defendant assented to a marriage ceremony being performed between them, and they were at said time and place married, and from that time, and at all times until the twenty-sixth day of February, 1897, lived together in Ada county as husband and wife; that on the fourteenth day of May, 1897, the plaintiff, Flora A. Deeds, still believing she was the wife of defendant, and that the decree and judgment hereinbefore referred to granting a divorce from her said husband, Rufus M. Deeds, was in full force and effect, commenced in the district court for Ada county, Idaho, an action for divorce against the defendant herein, alleging as the basis and grounds of said divorce cruel and inhuman ³²⁰ treatment on his part. Defendant filed a cross-complaint in said action, alleging that the marriage between himself and the said plaintiff, Flora A. Deeds, was null and void, among other things, because the court, in granting the divorce between herself and plaintiff, Rufus M. Deeds, had no jurisdiction to make or enter such judgment and decree; whereupon, and on the twenty-ninth day of November, 1897, and after said cause had been heard and determined in said district court, said court rendered its judgment, deciding, among other things, that the judgment and decree in said cause of Deeds against Deeds was null and void, and appeal from said judgment of the district court to the supreme court of the state of Idaho was taken by said Flora A. Deeds, and the said judgment and decree of the district court was by said supreme court affirmed (*Strode v. Strode*, 6 Idaho, 67, ante, p. 249, 52 Pac. 161); that while the plaintiff, Flora A. Deeds, was living with the defendant as his wife aforesaid, and believing herself to be his wife as aforesaid, and in the month of May, 1895, in Ada county, state of Idaho, the defendant without fault of said plaintiff, and without her knowledge, connivance, privity, or consent, became affected with a certain loathsome and infectious disease, commonly and generally known as gonorrhea, and communicated said disease to plaintiff, and infected her therewith. The complaint then goes on to elaborate the sufferings of plaintiff by reason of said disease, and the neglect and ill-treatment of her by the defendant, and closes with a demand for damages in the sum of twenty-five thousand dollars.

It does not appear that the defendant in any way misled the plaintiff, that he made any false representations to her, or practiced any fraud upon her, to induce her to enter into the marriage relation with him. If there was fraud or deceit practiced in bringing about the relation, it was presumably, under the statements in her complaint, attributable to the plaintiff. She was the incapacitated party. It was by her procuration—upon her motion—that the pretended divorce from Deeds, her former husband, had been procured. She was in a position to know, and is presumed to know, whether that divorce was legal or not; whereas the defendant cannot be presumed to have any knowledge or information upon that subject. ³²¹ There is no allegation in the complaint that defendant knew of the existence of the divorce in Deeds against Deeds. The plaintiff, holding herself out as one capacitated and qualified to enter into the marriage relation, accepted the proposals of the defendant to, and did, enter into such relations with him. Her act was at least a fraud upon the defendant. Plaintiff claims that by, through, and in consequence of said relations she has been damaged, and asks the court to award her compensation for such damage. We know of no principle of law or equity which will support this contention. Appellants' counsel cite Nelson on Divorce and Separation, section 1023. The language there used is as follows: "The woman is relieved of her incapacity to sue and be sued. She may sue the man who has entrapped her into a void marriage, and compel him to account for rents and profits of property he took under such marriage. Where a woman is induced by fraud and deceit to enter into a void marriage, she may recover damages for such tort without first having the marriage annulled." This may be accepted as a correct statement of the law; but how is it made applicable to the case made by the record under consideration? The plaintiff has undoubtedly the right to sue and be sued, but to avail herself of that right she must, like every other person, have a cause of action. There is no question of property rights involved in this case. It is not claimed that the plaintiff brought to the community any estate or property whatever, or that the defendant derived any pecuniary benefit from said relation. The complaint alleges that the defendant is the owner and possessed of property of the value of one hundred and fifty thousand dollars. It is not claimed or pretended that the plaintiff was "induced by fraud and deceit to enter into a void marriage." The case of McDonald v. Fleming, 12 B. Mon. 285, cited in note to section 1023 of Nelson on Divorce and Sepa-

ration, was one in which the parties, after having cohabited together as husband and wife for several years, separated, and the woman brought action to recover for her services during the time of such cohabitation, and also for money advanced by her to the defendant for the purchase of certain real estate. The court held that, while she could not recover for services, ³²² she might for the money advanced, and so decreed. The parties in that case were in *pari delicto*. While this decision supports the text in *Nelson*, it has no application to the facts in the case at bar. *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747, cited by appellants in their brief, was an action brought by the plaintiff to recover damages of the defendant for fraudulently inducing the plaintiff to marry the defendant, and to cohabit with him, he having another wife living, from whom he was not lawfully divorced, and the defendant being at the time incapacitated to marry anyone while his prior wife was living. The plaintiff's right to recover in that case was based upon the fraud of the defendant. It could not be considered an authority in support of the contention of the plaintiff in this case. In *Robbins v. Potter*, 98 Mass. 532, cited by appellants, the plaintiff sued to recover money advanced to defendant by her while they were living together as husband and wife under a marriage which both parties knew to be void. The court in that case held, in substance, that while the plaintiff would not be allowed to recover for services rendered to defendant during the existence of the illegal relation between them, still she could recover for money loaned defendant during that period, and which he had expressly contracted to pay. *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892, cited by appellants, was an action for services—held no recovery could be had. The case of *Higgins v. Breen*, 9 Mo. 497, is not in point—another case of fraud by defendant. We have examined carefully all of the cases cited by counsel, and have found not one which supports, even by implication, the contention of appellants. *Cooley on Torts*, page 279, has under the head of "Fraudulent Marriage," the following: "A serious wrong can be accomplished by inducing anyone, through misrepresentation and fraud, to enter into an illegal marriage. . . . The tort in such a case consists in the fraud accomplished, to the woman's serious, and perhaps permanent, injury." Counsel for appellants insist that, the injury of which plaintiff complains having been the result of the wrongful act of defendant, plaintiff should be entitled to recover therefor, the same as though defendant had assaulted or ³²³ poisoned her. We do

not recognize the parallel contended for. The injury complained of in this case could scarcely have arisen but for the illegal relations existing between the parties, and such relations were entered into voluntarily by plaintiff, and were not induced by any fraud or misrepresentation on the part of the defendant; and the plaintiff's incapacity to enter into marriage relations constituted the illegality. The injury was consequent upon her own illegal act, and we know of no principle of law authorizing recovery for injuries in such a case. Judgment of the district court affirmed, with costs to respondent.

Sullivan, C. J., and Quarles, J., concur.

The Holding of the Principal Case as to the liability for communicating a contagious disease is considered in the monographic note to *Missouri etc. Ry. Co. v. Wood*, 93 Am. St. Rep. 851.

OF THE EFFECT OF A VOID MARRIAGE.*

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I. Binding Effect in General.

a. May be Disregarded—Collateral Attack.—Under ordinary circumstances, the effect of a void marriage, so far as concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place: *Drummond v. Irish*, 52 Iowa, 41, 2 N. W. 622; *Gathings v. Williams*, 27 N. C. (5 Ired.) 487, 44 Am. Dec. 49. "Its invalidity may be maintained in any proceeding in any court between any parties, whether in the lifetime or after the

*REFERENCES TO MONOGRAPHIC NOTES.

What marriages are void: 79 Am. St. Rep. 361-384; 44 Am. Dec. 51-57.

Division of property accumulated during a void marriage: 68 Am. St. Rep. 375-379.

death of the supposed husband or wife, or both, and whether the question arises directly or collaterally": *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110. To the same effect, see *Medlock v. Merritt*, 102 Ga. 212, 29 S. E. 185; *Orchardson v. Copfield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197; note to *Gathings v. Williams*, 44 Am. Dec. 54. In Pennsylvania, however, an incestuous marriage, which is declared void by statute, cannot be inquired into after the death of either of the parties: *Walter's Appeal*, 70 Pa. St. 392.

But while a void marriage is open to collateral attack (*Unity v. Belgrade*, 76 Me. 419), a voidable marriage, so long as it has not been avoided or dissolved, must be treated as valid in all collateral proceedings: *Boylan v. Deinzer*, 45 N. J. Eq. 485, 18 Atl. 119; *State v. Setzer*, 97 N. C. 252, 2 Am. St. Rep. 290, 1 S. E. 558. For all civil purposes, it is valid until avoided or annulled: *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141, 10 South. 646; *State v. Lowell*, 78 Minn. 166, 79 Am. St. Rep. 358, 80 N. W. 877. It can be declared void only upon the application of the party thereto who is entitled to such declaration, during the lifetime of the other: *Copsey v. McKinney*, 30 Barb. 47; *Parker's Appeal*, 44 Pa. St. 309.

b. Necessity and Propriety of Annulment.—No decree of a court is necessary to avoid a void marriage, and restore the parties to their original rights: *Bell v. Bennett*, 73 Ga. 784; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Gaines v. Relf*, 53 U. S. (12 How.) 472, notwithstanding the statutes make provision for the annulment of such marriages: *Drummond v. Irish*, 52 Iowa, 41, 2 N. W. 622. When one of the parties to a marriage has a spouse living at the time of its celebration, the party thus imposed upon may, without a decree of annulment, legally contract another marriage: *Martin v. Martin*, 22 Ala. 86; *Reeves v. Reeves*, 54 Ill. 332; *Dare v. Dare*, 52 N. J. Eq. 195, 27 Atl. 654.

Still, a party to a void marriage may maintain a suit to have it annulled: *Fuller v. Fuller*, 33 Kan. 582, 7 Pac. 241; *Johnson v. Kincade*, 37 N. C. (2 Ired. Eq.) 470; *Waymire v. Jetmore*, 22 Ohio St. 271. And his administrator may bring such suit: *Barth v. Barth*, 102 Ky. 56, 80 Am. St. Rep. 335, 42 S. W. 1116. Indeed, there is obvious propriety in having a judicial determination of the invalidity of such a marriage, conducing, as it will, to good order and decorum and to the peace of mind of the party seeking it. Besides, the fact of nullity is thereby made a matter of record which cannot be disputed when the parties are dead or the evidence dimmed by the lapse of time: *Rawdon v. Rawdon*, 28 Ala. 565; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Weightman v. Weightman*, 4 Johns. Ch. 343. "A void marriage imposes no legal restraint upon the party imposed upon from contracting another, though prudence and delicacy do, until the fact is so generally known as not to be a matter of doubt, or until it has been impeached in a judicial proceeding": *Patterson v. Gaines*, 47 U. S. (6 How.) 550, 592.

c. Dissolution of Marriage and Alimony.—A divorce, however, cannot be predicated upon a void marriage, for the obvious reason that there is no marriage to dissolve. The relation of husband and wife is at the very foundation of a divorce, and must be established affirmatively before a divorce will be granted: *Mangue v. Mangue*, 1 Mass. 240; *Finn v. Finn*, 62 How. Pr. 83; *Blinks v. Blinks*, 25 N. Y. Supp. 768, 5 Misc. Rep. 193.

Likewise, the right to alimony grows out of the marital relation and is dependent upon it for existence. A void marriage ordinarily confers no right to alimony: *Taylor v. Taylor*, 7 Colo. App. 549, 44 Pac. 675; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736; monographic note to *Werner v. Werner*, 68 Am. St. Rep. 375, discussing the question more in detail. Although when a man brings a suit for the annulment of his marriage upon the ground of its illegality, which illegality his reputed wife denies, she is entitled to an allowance for her temporary support and for the purpose of defending the suit: *Vroom v. Marsh*, 29 N. J. Eq. 15; *North v. North*, 1 Barb. Ch. 241, 43 Am. Dec. 778; *Wabberson v. Wabberson*, 57 N. Y. Supp. 405, 27 Misc. Rep. 125. If the marriage is found valid, the court may award her extra expenses and counsel fees beyond the taxable costs: *Griffin v. Griffin*, 47 N. Y. 134. But if she admits she is not his wife, and the facts show she is not, no allowance for alimony and counsel fees should be made: *Appleton v. Warner*, 51 Barb. 270. Nor should there be in case they both admit the marriage void: *Knott v. Knott* (N. J. Eq.), 51 Atl. 15. It has been held that the court will not allow counsel fees and alimony pendente lite to the plaintiff in an action by a wife against her husband to annul their marriage: *Bloodgood v. Bloodgood*, 59 How. Pr. 42; *Meo v. Meo*, 22 Abb. N. C. 58, 2 N. Y. Supp. 569; *Herron v. Herron*, 59 N. Y. Supp. 861, 28 Misc. Rep. 323. According to the better rule, however, if there is a marriage in fact which is voidable merely, she is entitled to such allowance: *Lea v. Lea*, 104 N. C. 603, 17 Am. St. Rep. 692, 10 S. E. 488; *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724.

“In many cases where the man opposes the suit of the woman to annul their marriage, and sets up that she is his lawful wife, justice might require that on motion for temporary alimony the defendant, the man, should be treated as the husband of the complainant, according to his own insistent. But when at the time of the application for temporary alimony it is clear that any marriage between the parties was void ab initio, and neither party to the motion claims otherwise, there seems to be no possible foundation for any order for alimony. Alimony, as has often been said, is allowed to a wife. It can be allowed only when at the time it is applied for the man from whom it is sought must, for the time being, be presumed to be under the obligations of a husband toward the woman to whose support and maintenance it is to be applied. It has been argued that, where the wife attacks the marriage as void, she has a right to alimony apparently without regard to whether the hus-

band contests her claim or not: 2 Bishop on Marriage and Divorce, secs. 926, 927. The reason for this rule seems to be that presumably the man, by the pretended marriage, has become possessed of the woman's property, thus leaving her without support. It might be sufficient to point out that in New Jersey there is no such transfer of property from the wife to the husband upon the marriage as above referred to. But if in fact the man, by means of the pretended marriage and the relations of confidence thereby created, has fraudulently possessed himself of the woman's estate, for all such cases the law provides abundant remedies. The defrauded woman can bring an action of tort against the man, and recover damages for the injuries caused by the fraud": *Knott v. Knott* (N. J. Eq.), 51 Atl. 15.

II. Property Rights Growing Out of the Relation.

a. Effect of Good Faith of the Parties.

1. **In General.**—In Louisiana, the law gives to a putative marriage contracted in good faith all the civil effects of a valid marriage up to the time of its judicial annulment: Succession of Buisiere, 41 La. Ann. 217, 5 South. 668; *Smith v. Smith*, 43 La. Ann. 1140, 10 South. 248; monographic note to *Werner v. Werner*, 68 Am. St. Rep. 378. In case only one of the parties is in good faith, the civil effects can benefit only that party and the children born of the marriage: *Summerlyn v. Livingston*, 15 La. Ann. 519; Succession of Taylor, 39 La. Ann. 823, 2 South. 581. And when a void marriage is not entered into in good faith by either party, it produces no civil effects in favor of them or of their offspring: *Monnier v. Cou-tejean*, 45 La. Ann. 419, 12 South. 623. A cohabitation known to be adulterous in its origin is held to give no rights to the guilty parties against third persons: *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218.

2. **Statutory Provisions.**—The doctrine enunciated by the above Louisiana decisions is a part of the statutory law of that commonwealth. Other states have also enacted statutes for the protection of innocent parties to an invalid marriage. The Iowa statute reads: "In case either party entered into the contract of marriage in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree, and the court may decree such innocent party compensation, as in cases of divorce": *Barber v. Barber*, 74 Iowa, 301, 37 N. W. 381. And the Wisconsin statute provides for the restitution of property which the husband has received from his wife, upon a judgment annulling the marriage: *Wheeler v. Wheeler*, 76 Wis. 631, 45 N. W. 531.

b. **Individual Property of Each Party.**—A husband acquires no interest in the property which his wife has at the time of their marriage, if it is void, and his creditors cannot reach it: *Kelly v. Scott*,

5 Gratt. 479. A gift from her father, after the marriage, vests the property in her, the law considering her a feme sole: *Sellars v. Davis*, 4 Yerg. 503. And she can recover her property when the marriage is declared void, for it never vested in the supposed husband: *Lawson v. Shotwell*, 27 Miss. 630. When a decree of annulment is granted, the statutes of some states, as has already been noted, authorize the court to restore property which he has received from her: *Wheeler v. Wheeler*, 76 Wis. 631, 45 N. W. 531. She may compel him to account for the rents and profits of the property he took from her under the supposed marriage, and to redeliver the property to her with its proceeds, retaining for himself the benefits of his improvements. And she may recover for the use of her furniture, hire of her negroes, moneys borrowed by him, and even debts of his paid by her since his death: See the monographic note to *Smith v. Smith*, 46 Am. Dec. 131, citing *Fox v. Dawson*, 8 Mart. (La.) 94; *Young v. Naylor*, 1 Hill Eq. (S. C.) 383. It would seem clear that she could maintain an action of tort against him, if by means of the pretended marriage he has fraudulently possessed himself of her property: *Knott v. Knott* (N. J. Eq.), 51 Atl. 15.

c. Money Advanced by the Wife.—If a woman lives with a man as his wife, when in fact she is not so, and advances him money with which he in part pays for real estate, she has an interest in the property and a lien thereon for the amount advanced, with interest: *McDonald v. Fleming*, 51 Ky. (12 B. Mon.) 285. And upon the annulment of a void marriage, the court may order the husband to return to the wife money which he has received from her, with interest: *Wheeler v. Wheeler*, 79 Wis. 303, 48 N. W. 260.

d. Property of Deceased Party.—A widow, in the event of her marriage being voidable merely, may claim her distributive share in the estate of her husband: *Bowers v. Bowers*, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99; *Wiser v. Lockwood*, 42 Vt. 720. But the surviving party to a void marriage takes no interest in the estate of the other: *Hayes v. Rollins*, 68 N. H. 191, 44 Atl. 176; *Estate of Grimm*, 131 Pa. St. 199, 17 Am. St. Rep. 796, 18 Atl. 1061. If the woman survives such a marriage, she is not entitled to a homestead and other property exempt from administration: *Oldham v. McIver*, 49 Tex. 556. And the administrator of the man cannot recover from the woman a chattel given to her by a third person during the unlawful relation: *Calloway v. Bryan*, 51 N. C. (6 Jones) 569. It is held that where a marriage which was contracted in Illinois in accordance with its laws is annulled in a foreign country, the wife is thereby deprived of all rights, as widow or heir, in her deceased husband's estate in Illinois: *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81.

If a marriage is solemnized under the mistaken belief that the husband of the wife had died, both parties being equally informed of the previous marriage and of the circumstances from which the

death of her husband was inferred, and the marriage is followed by the assumption of marital duties and privileges until the death of the man, his heirs cannot in equity compel her to surrender property or rights vested in her by an antenuptial contract, upon the ground that it was entered into under a mistaken assumption that her husband was dead: *Ogden v. McHugh*, 167 Mass. 276, 57 Am. St. Rep. 456, 45 N. E. 731.

e. Dower and Curtesy.—If a marriage is merely voidable, and it is not dissolved during the lifetime of the husband, the wife is entitled to dower: *Spicer v. Spicer*, 16 Abb. Pr., N. S., 112, 124; *Elliott v. Gurr*, 2 Phil. Ecc. 16. But if it is annulled, she is not dowable in the estate owned by him at the date of the decree of annulment: *Price v. Price*, 124 N. Y. 589, 27 N. E. 383. "By the common law," says Chief Justice Follett in this last case, "neither dower nor curtesy arises from a voidable marriage, if it be annulled during the lifetime of the parties, and when annulled by the judgment of a competent court, they are in the same situation in respect to each other, and to rights in the property of each other, as though a marriage had never been entered into, and the children born of it are illegitimate unless legitimated by statute."

When a marriage is void, because incestuous or bigamous or for other reasons, it has been uniformly held that the woman acquires no right to dower, notwithstanding she has acted in good faith. The reason is plain. Dower is a consequence of marriage, and if there is no marriage there can be no dower: *Jenkins v. Jenkins*, 32 Ky. (2 Dana) 102, 26 Am. Dec. 437; *Donnelly v. Donnelly*, 47 Ky. (8 B. Mon.) 113; *McIlvain v. Scheibley*, 22 Ky. Law Rep. 942, 59 S. W. 498; *Smart v. Whaley*, 14 Miss. (6 Smedes & M.) 308; *Higgins v. Breen*, 9 Mo. 497; *Cropsey v. Ogden*, 11 N. Y. 228; *Smith v. Smith*, 5 Ohio St. 32; *Kennelly v. Cowle*, 6 Ohio Dec. 170, 4 Ohio N. P. 105; *De France v. Johnson*, 26 Fed. 891.

The hardship and injustice of this rule when applied to an innocent party is recognized in the last case, where Justice Nelson quotes as follows from 1 Scribner on Dower, sixth edition, 117: "No good reason can be urged why, as some compensation for the cruel wrong inflicted upon her, she should not be entitled to all the rights and claims of a wife upon the estate of the guilty individual who has betrayed her confidence; and it is far from creditable to the civilization of the age that no step has been taken in that direction."

f. Property Accumulated During the Marriage.

1. Equitable Division of.—A void marriage, as appears from the foregoing authorities, ordinarily confers no rights upon either of the parties in respect to the property of the other such as would be conferred if the marriage were valid. As to property accumulated during the existence of the relation, however, quite a different question is presented—a question which we have given consideration in a former note of this series: See the monographic note to *Werner v.*

Werner, 68 Am. St. Rep. 375-379. That note should be consulted in this connection, for what is here said is merely supplementary to the discussion there. The supreme court of Kansas has held, and very justly, that a woman who, having a husband living, contracted a marriage and lived with her supposed husband many years as his wife, is not precluded from resorting to a court of equity to compel a division of the property accumulated with her assistance, where it appears that before contracting the second marriage, she told of her former marriage and the circumstances connected therewith as she understood them, and was thereupon persuaded by her intended husband that the former marriage was invalid and constituted no obstacle to the contracting of a second marriage: *Werner v. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. 127.

But in *Schmitt v. Schneider*, 109 Ga. 628, 35 S. E. 145, it is held that a woman who cohabits with a man, renders household services, and turns over to him her earnings derived from work outside the family, under the belief induced by his fraud that she is his wife, cannot, upon ascertaining the truth, maintain against him an equitable petition to compel a division of property acquired with the proceeds of the earnings of both. Said Justice Lumpkin: "It is clear that the scheme of the petition was to obtain an accounting from Schneider, and a division, in kind, of property alleged to have been jointly to him and the plaintiff. Her object seems to have been to obtain a winding up and settlement of a quasi partnership between them, having its origin in the relations they had sustained toward each other during the years of their cohabitation. Manifestly, in this view of the petition, it was without equity or merit. There was no actual partnership, of course; nor did any trust in the property acquired by Schneider arise for the benefit of the plaintiff. She gave him no money to invest for her individual use, nor was there any undertaking or promise on his part, express or implied, to invest for her, or allow her any interest whatever in his accumulations. For her services, and for her money which went into his hands, he may be liable to pay; but the only relation which could, relatively to these matters, arise between them, is that of debtor and creditor. That he may have perpetrated a fraud upon her gives her no title, legal or equitable, to property acquired by him in his own right, although it may have been purchased with his ill-gotten gains; for, to compensate a person upon whom a fraud has been committed, the law affords full relief by providing for the recovery of damages."

2. **Partnership Nature and Division of.**—The courts of Texas have reached a conclusion somewhat similar to those of Kansas. And their solution of the question is to be commended as calculated to work justice in the class of cases to which it is applicable. In that state when a woman lives with a man as his wife, believing that she is such when legally she is not, their relation as to property accumulated by their joint efforts is considered as a partnership, and each

is entitled to an equal share of the accumulation without regard to the actual amount respectively contributed: *Lawson v. Lawson* (Tex. Civ. App.), 69 S. W. 246. In the course of the opinion, Justice Gill says:

"In the earlier decisions of this state the *de facto* wife was, under certain circumstances, accorded the property rights of a wife, notwithstanding her knowledge of the invalidity of the relation. This rule was applied by reason of the peculiar wording of the early laws governing land donations from the state on the faith of occupancy by families, and for other reasons growing out of the Spanish laws of marriage: *Babb v. Carroll*, 21 Tex. 765; *Lewis v. Ames*, 44 Tex. 345; *Yates v. Houston*, 3 Tex. 433.

"The reason for the rule does not apply to cases such as this, and now the courts refuse to award anything to a pretended wife, who, by reason of her knowledge of the illicit relation, occupies the position of an adulteress and a breaker of the laws. In such cases the courts will leave the parties as they find them, on the same principle that they refuse to enforce any other contract which by reason of its objects, or the nature of the consideration upon which it rests, is violative of law or against public policy. If the plaintiff is in such a position, she can neither be accorded the rights of a wife; nor will the courts declare a resulting trust in her favor, or allow the interest of a partner, however clear the proof may be, if to do so they must base the judgment upon the unlawful contract.

"In the case at bar, inasmuch as plaintiff was never the lawful wife of Harry Lawson, she could not, in any event, be entitled to the full property rights of a wife, such as homestead rights in a homestead the separate property of the husband, or a one-third life estate in his separate realty. But if, in good faith, she has entered into the relation, the courts will not refuse her the just fruits of the labor of her hands, and permit the husband, who is equally guilty, if either is, to appropriate the partnership earnings to his own use.

"That this distinction has been recognized is clear from the opinion in *Chapman v. Chapman*, 16 Tex. Civ. App. 382, 41 S. W. 533, cited by appellant, where the court refused to award to the putative wife the full rights of a wife in property which was a donation by the state to a husband, and to the acquisition of which she contributed nothing, but did give to her a partnership interest in personal property acquired by their joint efforts during the existence of the relation. It would seem that such good faith, whether resting in mistake of fact or mistake of law, is enough to authorize the courts to treat the relation as a partnership, upon proof that something was actually contributed by each to the acquisition of the property claimed.

"What feature, then, do we find in this case which ought to induce the courts to treat plaintiff as a criminal, a breaker of the laws, a willing party to a contract involving a shameless and de-

bauching relation between the sexes? The record shows that Caroline and Alf Woods were negro slaves; that they lived together as husband and wife during the last years of slavery with the consent and approval of their master. This marriage was of no avail unless ratified after emancipation. It has been held that a continuance of the relation after emancipation is sufficient evidence of ratification, and constitutes a common-law marriage. The court found that the two did thus live together after emancipation, thus furnishing the requisite evidence of ratification, and that this fact rendered her attempted marriage with Harry Lawson in 1867 a nullity. Alf Woods, her slave husband, evidently regarded the slave marriage as without binding force; for in 1867 he married another in due form of law, and continued to live with her as his wife until his death in 1897—residing in the same neighborhood as the parties to this suit. So lived Caroline and Harry, joining the same church, attending it together as husband and wife, recognized as such by their neighbors, and evincing every evidence of their belief in the legality of their relation. They were of middle age at the date of their emancipation, and were clothed with freedom and thrown upon their own responsibility, doubtless with but vague notions of the laws in general, and a dense ignorance of the laws of marriage. Indeed, it may be truly said that at that time our courts had announced no clear views upon the subject of slave marriages. It was a problem yet to be worked out, and for years thereafter many of the questions growing out of the relation remained unsettled: See *Cumby v. Henderson*, 6 Tex. Civ. App. 521, 25 S. W. 673.

“This being true, the rights of the putative wife as to property thus acquired have appealed strongly to the courts; and many cases might be cited, not involving the exact question, which contain dicta clearly indicating the tendency of the courts toward the now established doctrine. To deny her any interest has appeared so manifestly wrong that the courts have not been slow to discover and apply principles of law under which she might be consistently protected. The almost perfect analogy between the marital relation in Texas and an ordinary partnership furnished an easy solution of the difficulty, so that now, when it is once ascertained that the relation is not tainted with conscious guilt, the courts can proceed with small difficulty, and adjust the property rights according to legal principles which are new only in the sense that they have found a new application. In *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154, Justice Head, in his discussion of the principles under which the putative wife, acting in good faith, might have her just rights secured to her, entered into a thorough review of the authorities, and held that the tendency of our courts, as evidenced by the decisions involving kindred questions, justified the conclusion that she should be treated as a partner as to all property shown to have been acquired by their joint efforts. In inquiring into the nature of the partnership, he looked to the contract by which the parties under-

took to form the relation of husband and wife, and pursued a line of reasoning which strongly commends itself to our judgment.

"The contract which the parties intended to make would, if they had the legal right to make it, have formed the marital partnership which would have entitled each to a half interest in all property acquired by their joint efforts, without reference to the proportion contributed by each. Such is the meaning of the contract they intended to make. How, then, can it be justly held that the property thus acquired should belong to one any more than to the other? The parties having placed themselves in an attitude to have the contract looked to in measuring their rights, there appears to us no reason why the nature of the agreement should not be made the test of the nature of the partnership. In this view of the case, the plaintiff would not be held to the strict proof required in establishing a resulting trust in property, the title to which had been taken in another's name. In this case the requirement is satisfied by full proof of the nature of the contract made, and that the property was acquired by their joint efforts during the continuance of the partnership relation. The rights of the parties being fixed by the contract of partnership, it would devolve upon neither to trace the funds into the property, and show the exact amount invested. It is enough to show, as in this case, that the parties were each without means at the inception of the relation, and that gradually, as a result of their joint efforts, the property sought to be partitioned had been acquired."

Where a woman is merely the concubine of a man during the period in which property is acquired, though incidentally to this illicit relation she performs the offices of cook and housekeeper and sometimes works on the farm, it is held that she acquires no community or partnership interest in the property: *Harris v. Hobbs*, 22 Tex. Civ. App. 367, 54 S. W. 1085.

III. Damages for Assault upon Wife.

a. **Husband not Entitled to.**—Under a void marriage the putative husband cannot recover damages for loss of services and expense occasioned by an assault upon his wife: *Emerson v. Shaw*, 56 N. H. 418. And when she recovers therefor in an action in which he is joined as plaintiff, he has no interest in the sum recovered, and his creditors cannot subject it to their claims: *Carpenter v. Smith*, 24 Iowa, 200.

IV. Compensation for Services Rendered by the Wife.

a. **Whether She can Recover.**—In a number of cases it has been decided that a woman who lives with a man as his wife, under the supposition that she is such when she is not, can recover compensation for her services: *Fox v. Dawson*, 8 Mart. (La.) 94; *Higgins v. Breen*, 9 Mo. 497. This doctrine seems to meet with approval in the more recent cases of *Schmitt v. Schneider*, 109 Ga. 628, 35 S. E. 145;

Knott v. Knott (N. J. Eq.), 51 Atl. 15. We have no difficulty in accepting it when it affords her protection, and probably it can be invoked oftentimes when no other relief is available. In many instances, however, it is entirely inadequate, as where the man fraudulently induces her to contract a marriage with him which he knows is void, or where, during the continuance of the relation, she contributes to the accumulation of property. In such cases the law should, and we believe does, afford her other and more satisfactory remedies, as is elsewhere pointed out.

In *McDonald v. Fleming*, 51 Ky. (12 B. Mon.) 285, it is decided that a woman maintaining the attitude of a wife without being one cannot recover for services rendered as a housekeeper, but in the same case it is held that she has an interest in land which he pays for in part with her money. Why the law should manifest a higher regard for the money advanced than for the services performed is not entirely clear. It seems that the woman in this case occupied more the position of a concubine than of a supposed wife; and so the decision can hardly be regarded as authority for the proposition that while persons live together as husband and wife, no implied promise can arise that one shall pay for work done by the other. But the case of *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892, is such an authority.

V. Fraud in Inducing the Woman to Marry.

a. Husband is Liable for.—In that case (*Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892) it is held that a woman deceived into the belief that she is married cannot sustain an action for services rendered by her as housekeeper for her supposed husband while living with him as his wife, and in ignorance that her marriage to him was void because the wife of a prior marriage was still living; but that, if she has any remedy, it is by an action for the deceit inducing her to marry by false pretenses or false promises. That the man in such a case would be answerable in damages for the fraud perpetrated we have no doubt; and it is so held in *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747.

VI. Settlement of the Woman.

a. Not Affected by the Marriage.—A void marriage contracted by a woman does not change the place of her settlement: *Middleborough v. Rochester*, 12 Mass. 363. If a marriage is annulled because of the mental incompetency of the husband, the woman's pauper settlement is not affected by the marriage: *Winslow v. Troy*, 97 Me. 130, 53 Atl. 1008. And the marriage of a man to an insane woman does not confer his settlement on her where the marriage has been decreed a nullity: *Reading v. Ludlow*, 43 Vt. 628.

KIESEL v. CLEMENS.

[6 Idaho, 444, 56 Pac. 84.]

HOMESTEAD—Hotel Property.—Premises occupied as a hotel by a man and his family are subject to homestead declaration, if the only statutory limitations on the acquisition of homestead rights are residence and value. (p. 279.)

S. C. Winters and Hawley & Puckett, for the appellant.

W. T. Reeves and Thomas F. Terrell, for the respondent.

446 HUSTON, C. J. This is an action to recover possession of certain real estate situated in Soda Springs, Bannock county, state of Idaho, and to quiet the title thereto in plaintiff. The complaint alleges recovery of a judgment by plaintiff against defendant, execution and sale thereon, and deed to plaintiff, as purchaser, by the sheriff, demand of possession by plaintiff, and refusal by defendant. Defendant answers, admitting the judgment, but alleges that, at the time said deed was executed and delivered by the sheriff, the time for redemption under said sale had not expired, and claims that for that reason said deed is void. No evidence appears to have been offered upon this point. Defendant also avers in his answer, and sets up in a cross-complaint, as to the property described in the complaint, that a long time prior to the rendition of said judgment, to wit, on the seventh day of October, 1889, defendant filed a declaration of homestead upon the real estate described in the complaint; that, at the time of filing said declaration, defendant was the head of a family; that he was residing on the premises therein described, and has continued ever since to reside thereon with his said family; and prays, in his cross-complaint, that said sheriff's deed to plaintiff be declared null and void, and that the same be ordered canceled; that it be decreed that said premises are a homestead; and that defendant be adjudged the owner thereof; for his costs; and for general relief. Upon the trial the defendant offered in evidence the following document:

"HOMESTEAD STATEMENT.

"Know all men by these presents, that I am the head of a family, residing at Soda Springs, Idaho territory, county of Bingham, and on the premises herein described, as follows, to **447** wit: Lot eight (8) in block twenty-six (26) in said Soda Springs survey, and containing one and one-quarter acres, in

S. 12, Tp. 9 S., of R. 41 E., B. M. That said premises above described are of the actual cash value of five thousand dollars. That I claim the above-described property as a homestead, under and by virtue of the laws of the territory of Idaho.

(Signed) "WILLIAM CLEMENS."

This instrument was duly acknowledged on October 7, 1889, and duly recorded. Plaintiff had judgment in the district court, from which judgment this appeal is taken.

The only question presented by this record for our consideration is, Was the property described in the declaration of homestead, at the time the same was made and recorded, subject to be declared upon as a homestead, under the statutes of Idaho? The district court held that, by reason of said premises being occupied by defendant and his family as a hotel at the time the declaration of homestead was filed, the same was not subject to homestead declaration, and the declaration filed thereon was void and of no effect to exempt said premises from levy and sale on execution. With this conclusion of the district court we cannot agree. The character of the occupancy, or use of the premises claimed as a homestead, so long as the same is occupied by the declarant as a residence and home for himself and his family, is immaterial, under the statutes of this state. The only limitations prescribed by the statutes of this state to the acquisition of homestead rights are residence and value. There is no distinction in our statutes, as there is in many of the states, between real estate located in a town, city, or village, and land used and occupied as a farm. There is no limitation in our statutes upon the amount of land that may be included in a homestead, so long as it is occupied as a residence, and does not exceed in value the limitations prescribed by the statute. If other limitations are deemed requisite, they must be fixed by the legislature, and not by the courts. The declaration of homestead in this case fully complies with the requirements of the statute. A liberal construction as to occupancy of homestead seems to be the rule recognized in most of the states, even where the restrictions are far less latitudinous than they ⁴⁴⁸ are in this state: *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404; *Gaylord v. Place*, 98 Cal. 472, 33 Pac. 484; *Gainus v. Cannon*, 42 Ark. 514; *Kelly v. Baker*, 10 Minn. 154 (Gil. 124); *Umland v. Holcombe*, 26 Minn. 286, 3 N. W. 341; *Lazell v. Lazell*, 8 Allen, 575; *Binzel v. Grogan*, 67 Wis. 147, 29 N. W. 895. The judgment of the district court is reversed, with costs

to appellants. The district court is directed to enter judgment in favor of defendant Clemens, as prayed in his cross-complaint.

Sullivan, J., on account of sickness, was not present at the hearing.

Quarles, J., concurs.

The Authorities are at somewhat of a variance on the question whether a hotel may be the subject of a homestead: See McDowell v. His Creditors, 103 Cal. 264, 42 Am. St. Rep. 114, 35 Pac. 1031; Beronio v. Ventura County Lumber Co., 129 Cal. 232, 79 Am. St. Rep. 118, 61 Pac. 958; Cass County Bank v. Weber, 83 Iowa, 63, 32 Am. St. Rep. 288, 48 S. W. 1067; Turner v. Turner, 107 Ala. 465, 54 Am. St. Rep. 110, 18 South. 210; monographic note to Pryor v. Stone, 70 Am. Dec. 349, 350.

GRAY v. LAW.

[6 Idaho, 559, 57 Pac. 435.]

ACKNOWLEDGMENT OF MARRIED WOMAN—Impeachment.—A certificate of a married woman's acknowledgement will prevail against an attack on the ground that it is false, unless the evidence of the falsity is clear and convincing and establishes the fact beyond a reasonable doubt. (p. 283.)

ACKNOWLEDGMENT—Uncorroborated Evidence to Impeach. A certificate of acknowledgment, if in proper form, must prevail over the unsupported testimony of the grantor, in the instrument to which the certificate belongs. (p. 283.)

J. A. Bagley and W. E. Borah, for the appellants.

Allen Miller, T. L. Glenn and E. E. Chalmers, for the respondents.

⁵⁶¹ SULLIVAN, J. This suit was brought to foreclose two mortgages, one on real estate and one on personal property, and for the cancellation of a decree of foreclosure and certificate of sheriff's sale thereunder in a suit entitled "Fred W. Law, as Administrator of the Estate of Hannah B. Humphreys, Deceased," ⁵⁶² against R. S. Spence and Eliza Spence, Husband and Wife." The complaint contains allegations necessary in a foreclosure action, and attacks said decree of foreclosure and certificate of sale on the grounds that the said defendant Eliza Spence "never appeared before the officer purporting to take her acknowledgment thereto"; "that he never made her acquainted with the contents of said pretended mortgage, separate

and apart from, and without the hearing of, her husband," as required by the provisions of section 2956 of the Revised Statutes. The defendants, Spence and wife, filed their disclaimer disclaiming any right, title, or interest in and to the real estate described in the complaint, and default was entered against them. The answer of said administrator put in issue the allegations of the complaint touching the validity of the said Humphreys mortgage. The cause was tried by the court without a jury, and judgment and decree entered in favor of plaintiff, Gray, who is the respondent. This appeal is from the judgment. The main contention is that Mrs. Spence, one of the defendants, who has disclaimed any interest whatever in the real estate described in the complaint, and who failed to answer the complaint further than to file such disclaimer, never appeared before the officer whose signature is attached to said certificate of acknowledgment, and that he did not make her acquainted with the contents of said mortgage, separate and apart from, and without the hearing of, her husband. To establish that issue the plaintiff introduced as witness said R. S. Spence and his wife, Eliza Spence. R. S. Spence testified that he drew up the said Humphreys mortgage, that he was a practicing attorney; that said mortgage was prepared and signed by himself and wife, and the certificate of acknowledgment was made by Mr. Mantonya, the acknowledging officer; that, after the mortgage was signed and acknowledged as appears of record, it was then presented to Mrs. Humphreys. He further testifies that he took the mortgage home to his wife, and that she signed it, and that he then brought it back to Mr. Mantonya; that he acknowledged the execution thereof before said Mantonya, and told him that that was his wife's signature, and he certified to it; that said officer did not go ⁵⁶³ to witness' house, to see his wife, at that time, and that his wife did not go before the acknowledging officer before the certificate was made. He testified as follows: "I think I saw him attach his certificate. The mortgage was in my possession from the time my wife signed it until the officer attached his certificate. My wife was at home at that time." On cross-examination he testified that: "Mantonya lived about a stone's throw from us. When Mantonya went home, he went down the street by our house. I don't know whether Mr. Mantonya went and informed my wife of the contents of this instrument, and whether she acknowledged to him that she signed it of her own free will or not, and without my hearing. No, sir; I

don't know. Q. And when he certified that he made her acquainted with the contents of this instrument without your hearing, and that she executed this instrument of her own free will and choice, you don't mean to say that that is not true? A. No, sir. I don't know. The facts are as I stated them, and that was the common practice in that day." He also testified that the respondent took legal advice as to the validity of the Humphreys mortgage at the time he took the mortgage sought to be foreclosed in this suit. Mrs. Eliza Spence testified on behalf of the plaintiff that she did not appear before Mr. Mantonya, and acknowledge to him that she consented to mortgage her home to Mrs. Humphreys. On cross-examination, she testified as follows: "I signed the mortgage down at my home, at my husband's request. I did it voluntarily. My husband did not coerce or compel me to sign it. Was not compelled by anyone to sign it," and, "I was willing to sign it, if my husband wanted it done. It was my free and voluntary act." Mrs. Spence's testimony is to the effect that her acknowledgment was not taken as required by law, while the witness Spence attempts to make it appear that the officer did not take his wife's acknowledgment, but finally testified that he did not know whether the officer took the same or not. We find in the record before us the separate answer of the witness R. S. Spence in the suit of Fred. W. Law, as administrator of the estate of Hannah B. Humphreys, deceased, against R. S. Spence and others, which suit was brought to foreclose the mortgage referred ⁵⁶⁴ to in the testimony of said Spence, above quoted. Said answer was duly verified by the oath of said witness Spence, in which he admits the due execution and delivery of the mortgage in question by himself and his said wife, Eliza Spence. In his testimony in the case at bar he attempts to set forth what was done by himself and wife and the officer in the signing and acknowledgment of said instrument, but he finally stated that he did not know whether the officer taking the acknowledgment (Mr. Mantonya) went and informed his wife of the contents of said mortgage, and whether she acknowledged it as her voluntary act and deed, or not. The testimony of said witness is contradictory, and most unsatisfactory, while the testimony of his wife would indicate that she did not appear before the officer, "and acknowledge to him that she consented to mortgage her home to Mrs. Humphreys." If courts of justice permit mortgages and deeds of real estate to be held void and set at naught on such contradictory and unsatisfactory evi-

dence, given by parties making them, security and permanency to titles to real estate will be a thing of the past. The evidence to impeach a certificate of acknowledgment must be very clear and convincing beyond a reasonable doubt: *Northwestern etc. Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764. The evidence in the case at bar is not of the high character required by that rule. The certificate of acknowledgment to the mortgage under consideration is in substantial compliance with the provisions of the statutes in regard to acknowledgments of married women: Rev. Stats. 1887, sec. 2960. In this case the woman is not contesting the validity of said mortgage, but a subsequent mortgagee with notice. In the case of *Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764, this court said:

"The intent and purpose of the statute are to protect the rights of married women from the dictation or domination of the marital companion. The end sought by the law is not to enable married women, either at the suggestion or dictation of their husbands, to perpetrate a fraud, by seeking to avoid, upon a mere technicality, what was, at the time it was made, a fair and honest transaction, the benefits of which had been received and enjoyed, either directly or indirectly, by the party seeking ~~565~~ to avoid it." While it is true Spence and wife are not attacking said mortgage directly, their mortgagee is doing so. The fairness of the transaction out of which said mortgage arose is fully shown, Spence having received two thousand five hundred dollars therefor. Mrs. Spence testified that she signed said mortgage freely and voluntarily, and without any force or coercion on the part of her husband. Said mortgage was drawn by said Spence, and he attended to the execution of it, and delivered it to Mrs. Humphreys. It was regular on its face, and the certificate of acknowledgment thereto was in due form, and certified by I. L. Mantonya, the auditor and recorder of Bear Lake county. To overcome the certificate of acknowledgment under the facts of this case, the evidence must be clear and convincing. The proof of its falsity must be made beyond a reasonable doubt: *Maxwell Land Grant Case*, 121 U. S. 381, 7 Sup. Ct. Rep. 1015; 1 *Devlin on Deeds*, sec. 531. The certificate of acknowledgment, if in proper form, must prevail over the unsupported testimony of the grantor: 1 *Devlin on Deeds*, sec. 529; *Mutual Life Ins. Co. v. Carey*, 135 N. Y. 326, 31 N. E. 1095; *Lickman v. Harding*, 65 Ill. 505. Public policy requires that such certificate should prevail over the unsupported testimony of an interested party, otherwise there would be no permanency,

and but slight security, in titles to lands: *Russell v. Theological Union*, 73 Ill. 337.

Counsel for respondent contends that a married woman ought to have the same right to impeach the certificate of her appearance before the officer making it, when in fact she did not appear before him, that a man has to prove a deed, professing to be signed by him, to be a forgery; and cites a long list of authorities in support of that proposition. This court does not question the correctness of that proposition. We indorse it; but that rule does not apply to the case at bar. The married woman in this case is not attempting to impeach the mortgage in question. If she were, and established its falsity beyond a reasonable doubt, she would be sustained in her contention. In the case at bar the mortgagee of said married woman is attempting to impeach a certificate of acknowledgment that is valid on its face, and has failed to establish its falsity beyond ⁵⁶⁶ a reasonable doubt. Unless this rigid rule be enforced, the officer taking the acknowledgment and certifying to the same would be at the mercy of the unscrupulous grantor, and perhaps liable in damages to any party injured by a certificate held to be false. Counsel for respondent cites *Dye v. Mann*, 10 Mich. 291. In that case the husband executed a mortgage on the homestead, which mortgage the wife did not sign. Thereafter the husband and wife duly executed a mortgage on such homestead, and duly acknowledged the same as required by law. The court held the first-mentioned mortgage void, and the second one valid. In the case of *Fisher v. Meister*, 24 Mich. 447, the court held that a homestead could not be conveyed or mortgaged without the signature of the wife, and that in cases where the wife joins her husband in a conveyance, her free separate acknowledgment is necessary. In *Dorsey v. McFarland*, 7 Cal. 342, the husband executed a mortgage on the homestead without his wife joining him. A subsequent mortgage was given, executed by both husband and wife. The former was held void and the latter valid. The above-cited cases are not in point. In *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054, suit was brought to foreclose a mortgage alleged to have been executed by defendant Hamilton and wife. The wife answered, denying that she ever appeared before the officer who certified to her acknowledgment. The court held that said certificate was not conclusive, but might be impeached by parol evidence. The decision also holds that the wife need not prove bad faith on the part of the mortgagee, or that he had notice of the falsity of

the certificate. In deciding the case at bar it is not necessary for us to decide whether Gray, the respondent, need prove bad faith on the part of Mrs. Humphreys, or that she had notice of the falsity of the certificate of acknowledgment, as the evidence is not sufficient to establish the falsity of said certificate. The Humphreys mortgage and certificate of acknowledgment thereto are valid on their face. The respondent accepted a mortgage from Spence and his wife on the same premises with full knowledge of those facts, and when he brought this suit to foreclose his said mortgage he attacked the validity of said ⁵⁶⁷ Humphreys mortgage, and the judgment and decree foreclosing the same, on the ground that the wife of Spence did not appear before the officer taking said acknowledgment, but failed to establish that fact beyond a reasonable doubt. He therefore must fail in his suit against said judgment and decree.

It is alleged in the complaint, and found by the court, that the sheriff's sale under the foreclosure decree of the Humphreys mortgage took place on the fourteenth day of November, 1897, thus showing that the time for redemption therefrom has long since expired, for which reason the respondent is not entitled to a decree foreclosing his mortgage on the real estate sued on herein. The judgment is modified, and the cause remanded, with instructions to dismiss the action as against the appellant Frederick W. Law, as administrator of the estate of Hannah B. Humphreys, deceased, and to strike out of the decree that part which directs the foreclosure of the plaintiff's real estate mortgage. The judgment appealed from as herein modified is affirmed. Costs of appeal are awarded to appellants.

Huston, C. J., concurs.

Quarles, J., did not sit at the hearing of this case, and took no part in the decision.

The Conclusiveness of Certificates of Acknowledgments is considered in the monographic note to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 150-159. See, too, the subsequent cases of *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90, 80 Am. St. Rep. 669, 80 N. W. 270; *Hayes v. Southern Home etc. Assn.*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 South. 527. It is said that a certificate will be upheld as against the unsupported evidence of the person certified to have executed it: *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008.

IN RE BOYLE.

[6 Idaho, 609, 57 Pac. 706.]

HABEAS CORPUS.—In the Case of Insurrection or Rebellion, the governor or the military officer in command may, for the purpose of suppressing it, suspend the writ of habeas corpus, or disregard it if issued. (p. 288.)

HABEAS CORPUS—Insurrection.—The Truth of Recitals in a governor's proclamation that a certain county is in a state of insurrection and rebellion will not be inquired into or reviewed on an application for habeas corpus. (p. 289.)

MARTIAL LAW—Declaring Without an Application from Local Officers.—If county officers fail in their duty to apply to the governor to proclaim the county in a state of insurrection and rebellion, he may issue such proclamation without their application. (p. 289.)

T. C. Robertson, Patrick Reddy and Plat B. Elderkin, for the petitioner.

Samuel H. Hays, attorney general.

609 **HUSTON, C. J.** This is an application for a writ of habeas corpus. To the petition a general demurrer is filed. The only question presented for our determination is, Does the petition state facts entitling the petitioner to the writ? The petition alleges the illegal detention of the petitioner, which sets forth the alleged cause of, and authority for, such detention; and it is upon the alleged illegality or want of authority therefor that petitioner bases his right to the writ. As to the facts set up in the petition, so far as not contradictory or conflicting, for the purposes of this decision, in so far as they are assumed to be true, do they constitute sufficient ground for the issuance of the writ? It appears from the petition that on ⁶¹⁰ the fourth day of May, 1899, the governor of the state of Idaho issued the following proclamation:

“State of Idaho, Executive Office.

“Whereas, it appearing to my satisfaction that the execution of process is frustrated and defied in Shoshone county, state of Idaho, by bodies of men and others, and that combinations of armed men to resist the execution of processes and to commit deeds of violence exist in said county of Shoshone; and whereas, the civil authorities of said county of Shoshone do not appear to be able to control such bodies of men, or prevent the destruction of property and other acts of violence; and whereas, on Saturday, the twenty-ninth day of April, 1899, at or near the town of

Wardner Junction, in said county of Shoshone, state of Idaho, an armed mob did then and there wantonly destroy property of great value, with attendant loss of life; and whereas said destruction of property with attendant loss of life by mob violence, as above set forth, is but one and a repetition of a series of similar outrages covering a period of six years or more just passed, the perpetrators of said outrages seeming to enjoy immunity from arrest and punishment through subserviency of peace officers of said county of Shoshone, or through fear on the part of said officers to such bodies of lawless and armed men; and whereas, I have reason to believe that similar outrages may occur at any time, and believing the civil authorities of said county of Shoshone are entirely unable to preserve order and protect property: Now, therefore, I, Frank Steunenberg, governor of the state of Idaho, by virtue of authority in me vested, do hereby proclaim and declare the said county of Shoshone, in the state of Idaho, to be in a state of insurrection and rebellion. In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the state. Done at the city of Boise, the capital of the state of Idaho, this fourth day of May, A. D. 1899, and of the independence of the United States of America, the one hundred and twenty-third.

“FRANK STEUNENBERG.

“By the Governor.

“M. PATRIE,
“Secretary of State.”

611 That thereafter, upon the call of the governor, a military force was sent into said Shoshone county by the President of the United States, which proceeded at once to secure the arrest of the parties engaged in and who committed the outrages of the 29th of April for the purpose of bringing such parties before the proper tribunal for trial. Among the parties who were arrested as being implicated in the murders, and other crimes resulting from the insurrection, riot, or rebellion of the 29th of April, was the petitioner, and he bases his claim to be discharged from such arrest upon various grounds: “1. No insurrection, riot, or rebellion now exists in Shoshone county; 2. The governor has no authority to proclaim martial law, or suspend the writ of habeas corpus; 3. That martial law does not exist in Shoshone county, and has not been proclaimed in said Shoshone county by anyone having authority to make such proclamation; 4. That the little disturbance of the 29th of

April is over; that the parties implicated in it, after having destroyed about a quarter of a million dollars of property, and committed several murders, have retired to their homes; and that, in recognition of the inalienable rights of the citizen, they ought not to be disturbed; 5. That the governor had no right or authority to send an agent or representative to Shoshone county to consult and advise with the military officer sent there by the federal government to assist in putting down the insurrection and restoring order in said county."

Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of habeas corpus rests with the legislative or executive power of the government; but, from our view of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it, if issued. The statutes of this state make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does and has existed in Shoshone county for the past ⁶¹² six or seven years, to proclaim such locality in a state of insurrection, and to call in the aid of the military of the state, or of the federal government, to suppress such insurrection, and re-establish permanently the ascendancy of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived, and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary. If the courts are to be made a sanctuary, a city of refuge, whereunto malefactors may flee for protection from punishment justly due for the commission of crime, they will soon cease to be that palladium of the rights of the citizen so ably described by counsel.

Section 7405 of the Revised Statutes provides: "When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders and is placed under the direction of any civil officer, it must obey the orders in relation thereto of such civil officer."

The facts set forth in the governor's proclamation warranted his action. It is true that some of the facts recited therein are negatived by averment in the petition, which would seem to put in issue the truth or falsity of those recitals. On application for writ of habeas corpus, the truth of recitals of alleged facts

in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed. The action of the governor in declaring Shoshone county to be in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put into force, to a limited extent, martial law in said county. Such action is not in violation of the constitution, but in harmony with it, being necessary for the preservation of government. In such case the government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can arm themselves and destroy vast properties, and kill and injure citizens, thus defeating the ends of government, and the government be unable to take all needful and necessary steps to restore law and ⁶¹³ maintain order, the state will then be impotent, if not entirely destroyed, and anarchy placed in its stead. It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in a state of insurrection, and for this reason the proclamation was without authority. The recitals in the proclamation show the existence of one of two conditions, viz.: That the county officers of said county, whose duty it was to make said application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty. Under the circumstances, it was the duty of the executive to act without any application from any county officer of Shoshone county. This conclusion is based upon what we deem a correct construction of the provisions of our constitution and statutes in force, construed in *pari materia*. It having been demonstrated to the satisfaction of the governor, after some six or seven years' experience, that the execution of the laws in Shoshone county, through the ordinary and established means and methods, was rendered practically impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law, and insure the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to hinder, delay or place obstructions in the path of duty prescribed by law for the executive, but rather to render to him all the aid and assistance in their power in his efforts to bring about the consummation most devoutly prayed for by every good and

law-abiding citizen in the state. The various questions raised by counsel have been considered by the court, and it is our conclusion that the petition does not state facts which show that the writ demanded ought to issue; wherefore the said demurrer has been sustained, and the writ denied.

Quarles and Sullivan, JJ., concur.

The Duty of the State to interfere to suppress tumult, riot, and unlawful violence within a city does not necessarily depend upon the decision of its mayor, or notification by that officer that a state of lawlessness and violence exists: *Chicago v. Chicago League Ball Club*, 196 Ill. 54, 89 Am. St. Rep. 243, 63 N. E. 695.

IDAHO GOLD MINING COMPANY v. WINCHELL.

[6 Idaho, 729, 59 Pac. 533.]

LIEN ON MINE Where Owner has been Ousted.—If one unlawfully ousts the owner from a mining claim, and in operating it creates debts, they are not legal claims for liens against the property. (p. 293.)

LIEN—Estoppel to Assert, by Claiming Purchase Money.—If one claims a lien on property for the payment of a debt, and, upon the property being sold on a contract made prior to the creation of the debt, goes into a court of equity and asks to have his lien claim paid out of the purchase money, he is estopped from thereafter resorting to the property to make the debt. (p. 294.)

DECREE Affecting Lands in Another State.—A decree of a court of equity, affecting title to real property in another state, will be given force there, if the court had jurisdiction of the parties. (p. 294.)

E. E. Chalmers, for the appellant.

W. T. Reeves and Thomas F. Terrill, for the respondent.

732 SULLIVAN, J. This action was commenced against twenty-eight defendants for the purpose of quieting the title to the Robinson and Austin mining claims and the Robinson millsite, all of which are patented and located in Bingham county. Due service of the summons was made on all of the defendants. Some of them suffered default, others filed disclaimers, and others demurred, which demurrers were overruled, and those demurring refused to plead further. Only the defendant Winchell answered and defended in the case. Judgment was entered in conformity with the prayer of the complaint

against all of the defendants except the respondent, Winchell; and, as to him, the court found that he had a valid lien and judgment against the said mining claims and millsite for the sum of six hundred and forty-nine dollars and forty-seven cents and costs, which he was entitled to enforce. This appeal is from the judgment in favor of Winchell.

Numerous errors are assigned, all to the effect that the court erred in rendering judgment in favor of Winchell, the respondent.

The following facts appear from the record: That on the twenty-eighth day of November, 1894, E. E. Chalmers and others were the owners of said mining claims, and the millsite and improvements thereon, and on that date entered into an agreement with the Idaho Gold Mining Company, the appellant, whereby they agreed to sell and convey, by good and sufficient deed of conveyance, free and clear of all encumbrances, said property to appellant for the sum of five thousand seven hundred dollars, to be paid in certain stipulated payments; said payments to be made at the bank of Wells, Fargo & Co., at Salt Lake City, Utah. A deed of said property, executed by said Chalmers and his co-owners, was at that time placed in escrow in said bank, to be delivered to the appellant corporation upon its making the payments as stipulated in said agreement. It was also agreed therein that the appellant should have immediate possession of said property, with the right to work the same during the life of said contract. It was also agreed that a former contract made by said E. E. Chalmers and co-owners with one Wilson for the sale ⁷³³ of said property, and which had been assigned to the appellant, should be surrendered to said Chalmers and his co-owners, which was done, and thereupon the appellant was put in possession of said mining claims, millsite and other property, and began work thereon. That on the twenty-eighth day of January, 1895, said first-mentioned contract was duly recorded in the recorder's office in said Bingham county, Idaho. That on the sixteenth day of August, 1894. and prior to the making of the first-mentioned contract, said Chalmers and his co-owners of said property entered into an agreement with the Union Mining and Milling Company (hereinafter referred to as the "Union company"), whereby they gave said company an option to purchase said property, and that said option was forfeited by said Union company by reason of its failure to perform the stipulations of said contract agreed to be performed by it. Said forfeiture occurred prior to the

making of the contract of November 28, 1894, with the appellant corporation. That on or about July 15, 1895, said Union company, claiming possession of said property under and by virtue of said forfeited option, entered upon said property, and unlawfully ousted appellant therefrom, and unlawfully held possession thereof from that date until about January 1, 1897. That during the time that said Union company so held possession of said property the respondent, Winchell, furnished wood to said last-mentioned company, which was used by said company in operating the mill situated on said property, and in working said mines. The Idaho Gold Mining Company, the appellant, kept and performed its contract with the owners of said property, and paid said five thousand seven hundred dollars, as it had agreed to, and the escrow deed was delivered to it. During the time that said Union company was thus unlawfully in the possession of said property it contracted a large amount of indebtedness in operating said mines and property, and failed to pay the same. Thereupon some of the creditors, and among them the respondent, attempted to file liens against said property, thus attempting to hold the property for the sums due them. That, after said five thousand seven hundred dollars was so paid into said bank, said creditors desired to have the amounts due them paid therefrom. Thereupon said bank brought an action in the district court of the third judicial district ⁷³⁴ of the state of Utah to compel said creditors to interplead among themselves, and to thus litigate and settle their various claims and priorities in and to said purchase money. That among many others, respondent, Winchell, appeared therein, and answered, claiming an interest in said money. Thereafter said action was tried, and judgment made and entered for the distribution of said fund among the various creditors according to their respective priorities. The respondent failed to get any part of said money applied on his claim. The trial court found the facts as above stated, among others, and also found, as a conclusion therefrom, that the respondent, Winchell, was not bound or estopped by the findings and judgment entered by said Utah court in said interpleader suit, and that the appellant was entitled to the discharge of its said property from the liens and claims of each and all of the defendants, except that of respondent Winchell, and also found that Winchell's lien for six hundred and forty-nine dollars and forty-seven cents, with costs, was a prior lien, and that he was entitled to foreclose the same. The Utah court found that appellant was en-

titled to a discharge of all of said property from the liens and claims of all the defendants, Winchell, the respondent, being one of them. It is also shown that the Union company procured deeds from the owners of said property to the greater portion of it during the time that the contract of sale with the appellant was in full force; that is, the owners, after making the contract with the appellant corporation, and while the same was in force, executed deeds of conveyance to the Union company for the most of said property.

It is contended by counsel for respondent that the Union company was not only the agent for, but the owner of, said property, so far as liens created in the working of said mines was concerned, and he calls attention to the Session Laws of Idaho, 1893, page 49, in support of that contention. We cannot construe said act to support respondent's contention. Section 1 of said act is as follows:

"Section 1. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to ⁷³⁵ create hydraulic power or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder, or any person having charge of any mining or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of and owner for the purpose of this chapter; provided, that the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter."

We do not think said act was intended to include a transaction like the one in the case at bar. If a person or corporation can unlawfully take and hold possession of the property of another, and create liens against it, as was done in this case, an owner may be deprived of his property without his consent, and without due process of law. Had the Union company gone into possession of said property with the consent of the appellant, then a very different question would be presented.

Counsel for respondent admit that the only question for determination is, Was the Union company the owner of that said property for the purpose of creating the lien of respondent? We

answer that question in the negative. Respondent in his answer avers that at the time he furnished said wood to the Union company it was "working and operating said mines as owners, and not as lessees, of any person or company," and that his claim of lien was filed, and suit brought to foreclose the same, against said Union company, and judgment then taken against it. The appellant company was not made a party to said suit, nor had it any interest therein. The respondent evidently considered the Union company the owner of said mining claims, and, under the facts of this case, his lien must be confined to his interest in said mining claims, which was nothing, at least, after the purchase price had been paid by the appellant. It is well settled that a lien like that under consideration cannot be imposed on property by one who has unlawfully ousted the owner. If so, it would be taking his property without his consent, against his will, and without due process of law.

736 In the interpleader action in the Utah court, respondent claimed an interest in the purchase price fund paid by appellant for said property, and asked to have his claim paid out of it. That fund was exhausted in the payment of claims prior to that of respondent's. He is estopped by his election to look to said fund, as well as by the force of the adjudication of the Utah court and the facts of the case. It is well settled that a decree of a court of equity, having jurisdiction of the parties, is binding on them, and, if it affects title to property in another state, such decree will be given force in that state: *Black on Judgments*, sec. 872; *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117; *Goodman v. Niblack*, 102 U. S. 556. The Utah court agreed that said pretended lien of respondent on said property was not a lien thereon, and that said property was discharged from the liens and claims of each and all of the defendants to that action, and this court will give effect and force to that decree. The judgment in defendant's favor is reversed, and the cause remanded, with instructions to the lower court to set said judgment in favor of respondent aside, and to enter judgment and decree quieting appellant's title to said property as against said lien of respondent. Costs of this appeal are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

A Lien can Generally be Created only by the owner of property, or by some person by him authorized: Lowe v. Woods, 100 Cal. 408, 38 Am. St. Rep. 301, 34 Pac. 959; Courtemanche v. Blackstone Valley St. Ry. Co., 170 Mass. 50, 64 Am. St. Rep. 275, 48 N. E. 937. A

mechanic's lien is ordinarily limited to the interest of the person for whom, or at whose instance, the materials are furnished or the labor performed: *Henderson v. Connelly*, 123 Ill. 98, 5 Am. St. Rep. 490, 14 N. E. 1; *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275.

A *Court of Equity* may exercise jurisdiction incidentally affecting property situated in another state: *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PEOPLE v. BARRETT.

[203 Ill. 99, 67 N. E. 742.]

EQUITY JURISDICTION Over Political Rights.—Courts of equity have no jurisdiction to enjoin an election board from producing, counting and canvassing ballots in a contested election case. (p. 298.)

CONTEMPT OF COURT—Disobedience to Void Injunction.—A person committed for contempt of court in disobeying an injunction which the court has no jurisdiction to issue is entitled to his discharge on habeas corpus. (p. 301.)

EQUITY JURISDICTION Over Political Rights.—Courts of chancery have no jurisdiction to grant an injunction to protect a person in the enjoyment of a political right or to assist him in acquiring such right. (p. 301.)

PUBLIC OFFICERS—Injunction to Protect.—The right of an officer de jure to hold an office is not a property right which a court of chancery can protect by injunction. (p. 302.)

ELECTIONS—Contests—Ballots as Evidence.—The production of ballots in a contested election case after they have been offered in evidence in another contest, merely requires proof that they have not been tampered with. (p. 303.)

W. W. Wheelock, L. Mayer and J. H. Hamline, for the relator.

W. T. Underwood, D. B. Cole and A. J. Hopkins, for the respondent.

102 HAND, C. J. The only question involved in this case is, Did the circuit court have jurisdiction in the chancery case to which the contempt proceeding was supplementary, of the parties thereto and the subject matter therein involved, and power to enter the order granting the writ of injunction? If the court had jurisdiction of the parties and the subject matter

of that suit, and power to order that the injunction issue, the relator cannot question the validity of the order committing him for contempt for violating the injunction, by habeas corpus, as that would be to attack the order collaterally, which cannot be done where the court has jurisdiction and is authorized to act. If, however, the court did not have jurisdiction of the parties or of the subject matter of said suit it was not authorized to act, and its order granting the writ of injunction was void, and the relator may be discharged by habeas corpus.

In *People v. Murphy*, 188 Ill. 144, on page 148, 58 N. E. 984, it was said: "It is well understood that a person imprisoned under the sentence of a court having jurisdiction of the subject matter and person of the defendant, and power to render the judgment, cannot be discharged on habeas ¹⁹³ corpus because of irregularities in the proceedings under which he is convicted, his remedy in such case being by writ of error. It is only when the judgment of conviction is void that a court will discharge a petitioner on habeas corpus." In *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 483, an injunction to enjoin a removal from office was issued by the United States circuit court. The injunction was disobeyed and Sawyer was adjudged guilty of contempt. He applied direct to the federal supreme court and was discharged on habeas corpus. The court said (page 221): "The circuit court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of contempt in disregarding that order is equally void. Their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged." It is conceded here that the court had jurisdiction of the parties. The contention is, therefore, narrowed to the consideration of whether the court had jurisdiction of the subject matter of the suit.

In *Marshall v. Board of Managers of the Illinois State Reformatory*, 201 Ill. 9, on page 15, 66 N. E. 314, 315, this court said: "It is elementary that the subject matter of all chancery jurisdiction is property and the maintenance of civil rights, and that matters of a political character do not come within its jurisdiction." And in *Sheridan v. Colvin*, 78 Ill. 237, on page 247: "The subject matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with

questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political ¹⁰⁴ character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances and where necessary for the protection of rights of property."

We think it apparent that the entire scope and object of the bill filed by Lorimer against the board of election commissioners and its chief clerk were for the assertion and protection of political, as distinguished from civil, personal or property rights. In *Fletcher v. Tuttle*, 151 Ill. 41, 42 Am. St. Rep. 220, 37 N. E. 683, the distinction between a political and civil right was pointed out. A political right is defined by Anderson to be "a right exercisable in the administration of government," while a civil right is said to be "a right accorded to every member of a distinct community or nation": Anderson's Law Dictionary, 905. And Bouvier says: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government." "Civil rights are those which have no relation to the establishment, support or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like": 2 Bouvier's Law Dictionary, 485. The objects sought by said bill were to retain an office, to prevent a public officer charged by law with the performance of a public duty from performing that duty, and to substitute the control of a court of chancery over the election machinery of the city of Chicago and give to it custody of the ballots, returns and tally-sheets, etc., of elections held in that city, instead of the board of election commissioners designated by law to perform those offices. These matters involve, in themselves, no property rights, but pertain solely to the political branch of the government and cannot be controlled by a court of chancery.

In *Fletcher v. Tuttle*, 151 Ill. 41, 42 Am. St. Rep. 220, 37 N. E. 683, a bill in chancery was filed by Fletcher to test the constitutionality of the apportionment ¹⁰⁵ act of 1893, and incidentally to enjoin the county clerk of Vermilion county from issuing or causing to be posted notices of election calling an election for members of the House of Representatives for the

eighteenth senatorial district under said act, and it was held that a court of chancery had no jurisdiction in such state of case, as the questions involved were purely political and did not involve a property or civil right. On page 57 the court said: "Wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office. Nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve, in themselves, no property rights, but pertain solely to the political administration of government. If a public officer charged with political administration has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election, or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy must be sought in a court of law, and not in a court of chancery."

In *Dickey v. Reed*, 78 Ill. 261, an election was held in the city of Chicago to determine whether that municipality would change its charter. A bill was filed against the members of the common council and the city clerk, in which it was alleged that there was no proper submission ¹⁰⁶ of the proposition to a vote of the people; that the election was therefore void; that a large number of illegal and fraudulent votes had been cast; that a large number not actually cast were deposited in the ballot-boxes; that in some of the wards there were no polling lists and no clerks; that the judges of election were about to return their canvass of the votes, including the illegal and fraudulent votes so cast. A temporary injunction was ordered, restraining the city council from canvassing the returns. This injunction was disobeyed by the members of the city council on the ground that the injunction was void because the court issuing the same had no jurisdiction of the subject matter of the bill. Mr. Justice Walker, in speaking for the court, on page 266 said: "It is urged by appellants that the court below had no power to en-

tain jurisdiction of the case or to issue the writ, and that all which followed the filing of the bill was utterly void; that the want of power to entertain a bill in such a case, or to make the restraining order, rendered the whole proceeding void and of no effect, and, being void, appellants had the right to disregard its requirements and to proceed to the performance of a plain duty required of them by the statute, although in violation of the restraining order of the court." And again, on page 271: "It has been held that a court of equity has no power to try a contested election, even where the statute has not provided a mode for contesting: See *Moore v. Hoisington*, 31 Ill. 243. Elections belong to the political branch of the government and are beyond the control of the judicial power. It was not designed, when the fundamental law of the state was framed, that either department of government should interfere with or control the other, and it is for the political power of the state, within the limits of the constitution, to provide the manner in which elections shall be held, and the manner in which officers thus elected shall be qualified and their elections contested. ¹⁰⁷ And the political power of the state may organize municipal bodies and put them into operation by the force of enactment or by election by the people to be thus governed, and they can provide the mode of reviewing the returns of all elections, to ascertain whether they are in accordance with the expressed will of the people, and until the courts are empowered to act, by the constitution or legislative enactment, they must refrain from interference. But did the court have a general power to hear and determine as to the fairness of the result of elections in this class of cases, on the requisite facts being stated in the bill? If so, then the court had power over the subject matter, although the facts were so defectively stated as to fail to confer jurisdiction in the particular case. We think clearly not, because no state of facts, however stated, could confer power to adjudicate in that class of cases. We are aware of no adjudged case or text-writer who has ever announced the power as inherent in the courts of equity to try contested elections between persons claiming an office, or in a case of this character."

In *Harris v. Schryock*, 82 Ill. 119, it was held that "the power to hold an election is political, and not judicial," and that "a court of equity has no jurisdiction to restrain officers from the exercise of such power."

In *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237, it was held that a court of equity had no jurisdiction to entertain a bill to enjoin the mayor and aldermen of a city from removing a party from an office and appointing a successor, and from preventing the party from discharging his duties after removal by them, as the party's remedy at law is complete by quo warranto against the successor or by mandamus against the mayor and councilmen.

In *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 483, the court said: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, ¹⁰⁸ the punishment or the pardon of crimes or misdemeanors or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses or for the removal of public officers, is to invade the domain of the courts of common law or of the executive or administrative department of the government."

From a diligent search of the text-books and digests we have been unable to find a single case which sustains the position that the rights sought to be enforced by said bill in chancery were other than political, or one which sustains the position that a court of chancery may grant an injunction to protect the party in the enjoyment of a political right or to assist him in acquiring such right, the trend of all the authorities being in accord with the statement of Mr. Chief Justice Fuller in *World's Columbian Exposition v. United States*, 56 Fed. 654, that "the office and jurisdiction of a court of equity, unless enlarged by express statutes, are limited to the protection of rights of property. The court is conversant only with questions of property and the maintenance of civil rights, and exercises no jurisdiction in matters merely political, illegal, criminal or immoral."

Our conclusion, therefore, is that the circuit court was without jurisdiction, and that its order imposing a fine upon the relator and ordering that he stand committed until the same was paid is void, as being *coram non judice*.

It is, however, suggested that the jurisdiction of a court of chancery may be sustained on the theory that Mr. Lorimer has a property right in his office, and that the effect of the injunction would be to preserve his title thereto. While it is true an officer *de jure* has a property right in the emoluments of his office, and may sue for and recover the same in an action at

law from an officer de facto who has collected them while in his possession of the office (*Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Kreitz v. Behrensmeyer*, ¹⁰⁹ 149 Ill. 496, 36 N. E. 983; *City of Chicago v. Luthardt*, 191 Ill. 516, 61 N. E. 410), a public office is not property, but a mere public agency created for the benefit of the state. In the *American and English Encyclopedia of Law* (volume 23, second edition, page 328), it is said: "It is well settled in the United States that an office is not the property of the officeholder, but is a public trust or agency; that it is not held by contract or grant; that the officer has no vested right therein, and that, subject to constitutional restrictions, the office may be vacated or abolished, the duties thereof changed and the term and compensation increased or diminished. The fact that a constitution may forbid the legislature to abolish a public office or diminish the salary thereof during the term of the incumbent does not change the character of the office nor make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment." The author, in support of the text, cites the following Illinois cases: *People v. Auditor*, 1 Scam. 537; *People v. Lippincott*, 67 Ill. 333; *People v. Wright*, 70 Ill. 388; *People v. Brown*, 83 Ill. 95; *Donahue v. Will County*, 100 Ill. 94; *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983; *People v. Kipley*, 171 Ill. 44, 49 Ill. 44. And the theory that ballots are like title deeds finds no support in reason or the authorities. The jurisdiction of a court of equity to preserve title deeds or evidence by bill to perpetuate testimony de bene esse or by way of discovery is part, only, of the auxiliary jurisdiction of a court of chancery, and is exercised only in aid of pending suits or suits about to be begun affecting property rights. If a court of chancery lacks primary jurisdiction to prevent a removal from office or over a contested election, or to prevent the casting of ballots or the counting of the same, or to control a procedure governing election contests, it certainly can have no auxiliary jurisdiction to prevent, by injunction, the ballots from being opened and the election being contested. To give it such auxiliary jurisdiction would ¹¹⁰ be to confer power over a shadowy incidental and at the same time deny to it jurisdiction over the substance which casts the shadow. If it were true that an unlawful counting of the ballots might destroy their evidentiary character, Mr. Lorimer's tenure of office would be rendered doubly safe, because if the ballots no longer existed as evidence, his certificate of office would conclu-

sively protect him. Such contention, however, is without force, as the opening of the ballot-boxes and the production of the ballots, as called for by the subpoena, would no more destroy them as evidence than would the opening and production of ballots before the city council or county court in a contested election case over which such body or tribunal had conceded jurisdiction. The production of ballots in a contest where the same have been offered in evidence in some other contest merely requires proof that the ballots have not been tampered with. In *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315, 61 N. E. 405, which was a proceeding to contest an election to the office of supervisor of the town of North Chicago, the ballots had been opened in another contest which was pending before the city council of Chicago and involved an aldermanic office. This latter contest had been referred by the city council to the committee on election. That committee appointed a subcommittee of three to count the ballots. The board of election commissioners of Chicago was requested to produce the ballots before the subcommittee, and did so produce them. It appeared that during such recount the ballots were not "mutilated, disfigured or in any manner changed, but were returned to said boxes in the same condition in which they were taken therefrom." The fact of such recount was held not to affect the evidentiary character of the ballots in the contest of the election of the office of supervisor, and it was held that they were properly admitted as evidence in such contest.

If a court of chancery, in a case like this, can maintain jurisdiction to restrain the board of election commissioners ¹¹¹ from counting the ballots or canvassing the same or producing them in a contest, the functions and power of the election commissioners will have been destroyed. We are fully convinced a court of chancery is not possessed of such jurisdiction.

From what has been said it follows that the imprisonment and detention of the relator by virtue of the mittimus issued in pursuance of the order of the circuit court was without authority of law, and he is therefore discharged therefrom.

Courts of Equity do not Interfere to determine controversies concerning the appointment or election of public officers and their title to office, nor their conduct in the performance of their official duties: See the monographic note to *Fletcher v. Tuttle*, 42 Am. St. Rep. 234; *Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297; *State v. Van Beek*, 87 Iowa, 569, 43 Am. St. Rep. 397, 54 N. W. 525; *Heffran v. Hutchins*, 160 Ill. 550, 52 Am. St. Rep. 353, 43 N. E. 709; *Arnold v. Henry*, 155 Mo. 48, 78 Am. St. Rep. 556, 55

S. W. 1089. If it is attempted to try title to office in a suit by injunction, a writ of prohibition will issue to prevent the court from proceeding: *People v. District Court*, 29 Colo. 277, 68 Pac. 224, 93 Am. St. Rep. 61, and cases cited in the cross-reference note thereto. However, an injunction may issue to protect an officer in possession of an office against intrusion by one claiming to be entitled thereto, when there is no attempt to determine the title: *State v. Superior Court*, 17 Wash. 12, 61 Am. St. Rep. 893, 48 Pac. 741; *Rhodes v. Driver*, 69 Ark. 606, 86 Am. St. Rep. 215, 65 S. W. 106.

PEOPLE v. HARRIS.

[203 Ill. 272, 67 N. E. 785.]

MANDAMUS to Compel Performance of Public Duty.—In a proceeding for mandamus to compel public officers to perform a public duty it is not necessary that the entire public join in the complaint as they may speak or interfere through one citizen alone. (p. 305.)

MANDAMUS to Prevent Obstruction of Street—Parties.—It is *prima facie* the duty of the mayor and city council to keep the streets free from all obstructions for the benefit of the public, and the performance of such duty may be compelled by any citizen by writ of mandamus without showing that he has any legal interest in the action. (p. 305.)

MUNICIPAL CORPORATIONS—Ordinance Permitting Encroachment on Street.—An ordinance permitting the construction of a bay window extending into the street, or any other encroachment thereon, for a purely private purpose or private use is void. (p. 310.)

MUNICIPAL CORPORATIONS.—Streets in Their Entirety are public properties exclusively for public use, and no part of them can be devoted exclusively to private purposes or private use by virtue of municipal ordinances or otherwise. (p. 310.)

T. J. Smith and Ray & Dobbins, for the appellant.

F. B. Hamill and Gere & Philbrick, for the appellees.

276 RICKS, J. The question presented for our consideration is the determination of the law on the admitted facts as set forth.

It is argued by defendants in error that the relator had no right to the writ of mandamus; that to entitle him to the relief prayed he must show some special damage other than that suffered by the public in general, and they cite the case of *McDonald v. English*, 85 Ill. 232, and rely upon this case, to a great extent, to sustain their answer. That was an action on the case for maintaining a public nuisance, the facts being, that appellee built, fronting on the street, by the side of appellant's

building, a stone step of the height of two feet and four inches and extending into the sidewalk in front of the building three feet and seven inches. Appellant claimed that the obstruction interfered with the access to his building and brought his action for damages. The appellee introduced an ordinance in evidence which was almost identical with the ordinance in question, but no question was raised as to the validity of the ordinance. The introduction of it was objected to by appellant. This court did not approve of the ordinance, but said that any effect it could have had on the jury was in appellant's favor, since the only thing it tended to prove was that the obstruction was unauthorized, as it extended into the sidewalk beyond the limit prescribed by the ordinance, and at page 236 we said: "We regard the rule well settled that for any obstruction to streets, not resulting in special injury to the individual, the public, only, can complain," and held that, inasmuch as appellant sustained no special injury, he could not recover. Other cases cited by defendants in error are of similar character, and have no application to the questions here involved. In this case the individual is not undertaking to recover damages, nor can it be said that it is an individual complaining, but it is the public complaining through ²⁷⁷ one of its citizens. In a proceeding for mandamus to compel public officers to perform a duty to the public it is not necessary that the entire public join in the complaint, but they may speak or interfere through one of their citizens, the people being the real party. Nor is it necessary, in this kind of proceeding, for a relator to show that he has any legal interest in the result of the suit, as it is *prima facie* the duty of the mayor and city council to keep the streets free from all obstructions, and the power is granted to be exercised for the public benefit, and its execution can be insisted on as a duty: *Hall v. People*, 57 Ill. 307. In this case the act to be performed by the defendants in error is a duty in which the people of the whole state are interested, and no doubt is entertained of the right of any citizen of the city to become a relator and institute this proceeding. It is, therefore, evident that the relator, as a citizen of Champaign, was a proper person to institute this proceeding: 2 *Smith on Municipal Corporations*, 1601-1604; *High on Extraordinary Legal Remedies*, 431; *County of Pike v. People*, 11 Ill. 202; *City of Ottawa v. People*, 48 Ill. 233. In the case of *County of Pike v. People*, 11 Ill. 202, the same question was raised in a mandamus proceeding, touching the authority of any person who is a citizen to insti-

tute the proceeding, and we there said (page 208): "Where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed and the right in question enforced. . . . The object of the suit is not a matter of individual interest, but of public concern. Any citizen of the county, especially of the locality interested in having the improvement prosecuted, could become the relator and obtain the mandamus."

The main question arising in this case, and the only one that we think need receive any special attention, relates to the power of the city to grant, by ordinance ²⁷⁸ or otherwise, the privileges to the property owner provided for by section 261 of its ordinance, as set out in the answers of defendants in error, and under which they attempt to justify. In their answers defendants in error admit that the sections set out in the petition are a part of the body of the ordinances of said city and are in force, but say that they must be considered together with section 261, which they set out. It will first be noticed that this section 261 does not purport to give authority to anyone to do anything, but only inhibits certain things therein specified being done under a penalty. It does not, in effect, say to the citizens that they are authorized by city authority to build steps, platforms and other fixtures three feet into the street or extend windows eighteen inches into the street, but that if any step, platform or other fixture be extended into the street more than three feet or any window be extended into the street more than eighteen inches, the person who shall place or extend the same shall be subject to a penalty, and, as we think, is very different from a general ordinance of the city which contained a provision that all the property owners might build such structures into the street to the extent of the distance named in the ordinance. But whether that view of it be tenable or controlling, we will treat the ordinance, for the purpose of our consideration, as defendants in error have done, as one supposedly giving authority to extend a window into the street eighteen inches.

Since 1845 our statute has declared it to be a public nuisance "to obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places, and ways to burying places": Starr & Curtis' Statutes of 1896, c. 38, sec. 221, par. 5. And while the legislature has vested in cities the power to lay

out, establish, open, alter and vacate streets, and to regulate the use of the same, it also imposed upon them the duty to prevent and remove encroachments or obstructions upon the same: Starr & Curtis' Statutes of 1896, c. 24, par. 63, p. 694. Defendants ²⁷⁹ in error admit that defendant in error Harris constructed and extended into the street a bay window to the extent of eighteen inches and that said window is about fifteen feet in width. Thus the questions are presented, Does the projection into the street constitute a purpresture within the meaning of the law; and is it a nuisance, and if it is, can the city, by ordinance, authorize the maintenance of such nuisance by the citizens for private uses or purposes?

When a public highway is once established all the beneficial uses of it vest in and devolve upon the public, and where, as in incorporated cities, the title to the streets is vested in the municipality, they are nevertheless charged with the public right. In fact, the city could have no authority to accept public streets upon any other conditions than that they should be for public use, and what is meant by public use is that the public shall have the uninterrupted, unimpeded and unobstructed use of every portion and part of such public highway—not only that they may use the ground or foundation to travel upon (which right is co-extensive with every inch or foot of it), but that they may enjoy the air, light and rainfall as well upon every portion of it. In *Field v. Barling*, 149 Ill. 556, on page 565, 41 Am. St. Rep. 311, 37 N. E. 850, we said: "Before Holden place was dedicated to the public as a street, the title of the United States, the original proprietor, was not confined to the surface of the ground, but its title extended upward, embracing the light and air as well as the soil, and the dedication of the strip of land for a public street embraced not only the surface of the ground, but the light and air above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil. In *Barnett v. Johnson*, 15 N. J. Eq. 481, where it was proposed to obstruct light and air over ground dedicated to the public, it is said: 'When the strip of land is declared a public highway, the adjoining owner has the right to light and ²⁸⁰ air from it. The column of light and air above the roadbed, whether of land or water, is as much a part of the highway as the roadbed itself. Take them away and there would be left no public passage. By its being declared a highway by the sovereign power, the light and air above it become again the common property of all, which all

may breathe and use whenever they may legally touch it, whether in the road or along its sides. . . . When cities and villages have been built up along a public highway, the right to light and air from it becomes vested, and even the legislature would have no more right to deprive them [abutting owners] of it without compensation than they would have to draw off the water from a navigable stream.'” Again, in *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, we said (page 296, 54 N. E. 825): “The title of the streets is vested in the city, and it has the conservation, control, management and supervision of such trust property, and it is its duty to defend and protect the title to such trust estate. The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control the possession exclusively for public use, for purposes of travel and the like. . . . The rule is, that all public highways, from side to side and from end to end, are held for the use of the public, and no other safe rule can be adopted.” Then, with the admission of defendants in error in the record that they have built a structure fifteen feet across and eighteen inches out into the street, their averment that the relator is not injured thereby or the public travel is not obstructed or public use interfered with is but their conclusion of law, and was entitled to no consideration in considering the merits of their answer: *Hibbard & Co. v. City of Chicago*, 173 Ill. 91, 99, 50 N. E. 256, 258. In the latter case we said: “The right of the public to the exclusive use of the streets for public purposes is inconsistent with the right of a private citizen to encroach thereon by the erection of a permanent ²⁸¹ structure. The streets are held in trust by the municipality, and this fact prevents the municipality from authorizing any encroachment on or obstruction of them by such structures. The mere consent of the city council, by resolution or order, gives no vested right. . . . The averment that the awning so erected does not injure or obstruct any person does not change the case. The sole question to be determined is: Is it an encroachment on the street of the city, and if so, is it a purpresture?”

Mr. Elliott, in his work on Roads and Streets, uses the following language (page 478): “Any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance per se, and may be abated, notwithstanding space is left for the passage of the public. This is the only safe rule, for if one person can permanently use a

highway for his own private purposes, so may all; and if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without becoming a nuisance there would be no certainty in the law, and what was at first a matter of small consequence would soon become a burden, not only to adjoining owners, but to all the taxpayers and the traveling public as well. Thus expediency forbids any other rule. But even if it did not, the rule is well founded in principle, for it is well settled that 'the public are entitled not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler,' and if this be true it necessarily follows that there can be no rightful permanent use of the way for private purposes."

In the case of Reimer's Appeal, 100 Pa. St. 182, 45 Am. Rep. 373, it was held that a bay window in the second story of a city house, sixteen feet above the sidewalk and projecting three and one-half feet beyond the building line, was a public nuisance, which could not be justified by ordinance, and its construction could be enjoined by the public. To ²⁸² the same effect are *City of Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758; *Snyder v. City of Mt. Pulaski*, 176 Ill. 397, 52 N. E. 62. Quoting from *Snyder v. City of Mt. Pulaski*, 176 Ill. 402, 52 N. E. 63, we said: "The streets of a city are dedicated for public use, and for these purposes the city council may improve and control them and adopt needful rules for their management and use. But that body has no power to alien or otherwise encumber such streets so long as they are public streets, but must hold them in trust for public uses only, and hence no easement or right therein not of a public character can be granted by a municipality or acquired by any individual or corporation for exclusive private use to the exclusion of the public. . . . A permanent encroachment upon public streets for a private use is a pre-emption, and is in law a nuisance. . . . Such permission to so use the street is not binding upon the city and is not irrevocable. The municipality having no power to grant such permanent use, there can be no estoppel against it from requiring the street to be open in its entirety, because no estoppel can arise from an act of the municipal authorities done without authority of law."

If this ordinance is to be upheld, and is to be construed as conferring power upon those citizens owning properties along the line of the streets to build steps out in front of each property three feet, aerial ways and stairways three feet, windows and other projections eighteen inches, pray for whose benefit will we say these things are allowed to be done? Can it be said that such structures are of benefit to the hundreds of thousands, as the case may be, who do not own or have any interest in those homes or properties, and yet who have as much right to use the street in all its dimensions as do those who reside upon it? Can it be other than a mere private use or a use for private purposes? It matters not how many persons may build encroachments upon the streets ²⁸³ under such supposed ordinance, it would still be a private use and for private purposes, in which the public could have no interest and by which the public may be greatly annoyed and inconvenienced. If it be said that city authorities can, by ordinance or otherwise, permit the erection and maintenance of a structure extending three feet or eighteen inches into the street, then where shall we say is the limit? If they may deprive the citizens of a portion of the street, then what portion? And if it be said that it shall only be that portion that does not interfere with public travel, then must each obstruction and extension be left as an open question, to be determined in each case, as a matter of fact, whether there was an obstruction to travel and public use? If bay windows may be authorized to be extended into the street eighteen inches when near the ground, then why may not cities authorize property holders living opposite each other or property holders owning properties on each side of the street to cover the entire street, so long as they shall place their projections and obstructions high enough that the tallest man in the community, or the highest wagon or the biggest load that may be conceived of, may pass readily? It seems to us the very suggestion carries with it its own answer, and that there is no safe field of speculation other than to keep within the limits placed by the books, by saying that the streets in their entirety are public properties exclusively for public use, and that they, or any part of them, cannot be devoted exclusively to private purposes or private use.

With this law before us and with the views that we entertain upon the subject, as expressed in this opinion, we hold the ordinance relied on by defendants in error invalid, and it becomes

our duty to reverse the judgment of the circuit court of Champaign county, and remand this cause to that court for other and further proceedings not inconsistent with this opinion.

Mandamus will Issue to compel the performance by a public corporation of a public duty not due to the government as such, on the petition of a private person: *Pumphrey v. Mayor etc. of Baltimore*, 47 Md. 145, 28 Am. Rep. 446. See, too, *Crane v. Chicago etc. Ry. Co.*, 74 Iowa, 330, 37 N. W. 397, 7 Am. St. Rep. 479, and note; note to *Middlesex etc. Co. v. Knappmann-Whiting Co.*, 81 Am. St. Rep. 479. Thus a private citizen may apply for a writ to compel the operation of a street railway: *State v. Spokane St. Ry. Co.*, 19 Wash. 518, 67 Am. St. Rep. 739, 53 Pac. 719. By the weight of authority, the relator need not show that he has any special interest in the result, where the question is one of public right and the object is the enforcement of a public duty: See the monographic note to *Dane v. Derby*, 89 Am. Dec. 741; *State v. City of Kearney*, 25 Neb. 262, 13 Am. St. Rep. 493, 41 N. W. 175. But it has been held that mandamus to a municipal corporation to remove obstructions and keep open a public street will not lie, if no special injury to the relator is alleged, because an indictment for nuisance is an effectual remedy: *Reading v. Commonwealth*, 11 Pa. St. 196, 51 Am. Dec. 534. As to the right of an individual to enjoin the obstruction of a public street, see *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144. And as to his right to damages, see *O'Brien v. Central Iron etc. Co.*, 158 Ind. 218, 92 Am. St. Rep. 305, 63 N. E. 302.

The Obstruction of a Public Street by a private individual in his own interest cannot be authorized by a municipal corporation: *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629.

DEWITT v. SHEA.

[203 Ill. 393, 67 N. E. 761.]

DEEDS—Record as Evidence of Delivery.—The record of a deed is prima facie evidence of its delivery, and who ever questions this must assume the burden of proving that it was not delivered. (p. 312.)

DOWER—Adverse Possession.—If, under the statute, a widow may retain possession of her husband's usual dwelling-house and the land belonging thereto until dower is assigned, her possession is not adverse to the heirs until such assignment is made. (p. 315.)

ADVERSE POSSESSION.—Possession to Become Adverse must be hostile in its inception and exclusive in its character. (p. 315.)

ADVERSE POSSESSION Against Heirs—Marriage with Dowress.—One who comes into possession of land by marriage with a dowress does not hold adversely to her heirs, in the absence of proof of an actual surrender of possession to him, and his payment of taxes and improvement of the property does not make his possession adverse. (p. 315.)

H. C. Horner, for the appellants.

J. B. Simpson, for the appellees.

³⁹⁴ WILKIN, J. The contention of defendants in error that they are innocent purchasers, without notice of any claim of title by anyone else, cannot be sustained. At the time Edmund Shea received his deed from B. J. Horrell for an ³⁹⁵ eighty-acre tract, which includes the ten acres in controversy, the deed from Thomas Horrell to John Dewitt was on record and notice to all subsequent purchasers of rights acquired thereunder, and the record was prima facie evidence of the delivery of the deed to the grantee therein named, and whoever questions it must assume the burden of proving that it was not delivered: *Valter v. Blavka*, 195 Ill. 610, 63 N. E. 499; *Harshbarger v. Carroll*, 163 Ill. 636, 45 N. E. 565; *Warren v. Town of Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610. The only evidence in the record on this point is the admission of the plaintiffs in error, the children of the grantee, that they had never had the deed, and the statement of B. J. Horrell, an interested party, that he received the Dewitt deed from Thomas Horrell at the same time he received from him the deed to the eighty-acre tract which he has deeded to the defendants in error. For the purposes of this case it is unnecessary for us to pass upon the question of the competency of B. J. Horrell as a witness, for, conceding his competency, there is no evidence in the record sufficient to overcome the presumption of delivery arising from the record. Such a conclusion would be a mere supposition arising from the circumstance that the deed is found in the possession of the grantor and that possession not explained.

Defendants in error further contend that their title is good by limitation; that their grantor, B. J. Horrell, had adverse possession of the premises for more than forty years. At the time of his death, in 1851, John Dewitt was occupying the disputed premises under his deed from Thomas Horrell, and afterward his widow continued to occupy them until her death, in 1896. Under the statutes in relation to dower then in force, what is known as the "widow's quarantine" gave to the widow the right to retain "full possession of the dwelling-house in which her husband most usually dwelt, together with the outhouses and plantation thereto belonging, free from molestation and rent until her dower is assigned." Mrs. Dewitt's ³⁹⁶ dower never was assigned, and under the statute she was invested with the right of possession of the premises in controversy, which right

continued until her death, in 1896. This right accrued to her six years prior to B. J. Horrell's deed and three years prior to his marriage with Mrs. Dewitt, and was defeasible only upon assignment of dower: *Riggs v. Girard*, 133 Ill. 619, 24 N. E. 1031; *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014. When B. J. Horrell married Mrs. Dewitt he went into occupancy of the premises with her, and they both continued in occupancy thereof until her death. Her possession could never become adverse to that of her children, the plaintiffs in error (*Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014); and the possession of B. J. Horrell, even after receiving a deed to lands including the premises in controversy, in the absence of evidence to the contrary, does not seem to have been that exclusive, adverse possession, hostile in its inception, which is necessary to create a title by limitation. There is no evidence that the mother of plaintiffs in error ever turned over possession of the premises to B. J. Horrell. She simply married him and continued her possession as before, the children remaining at home until they were grown up. He would naturally appear to be the head of the house and in control of the premises, but to hold that he thereby came into adverse possession would be to require each child, on coming of age, to dispossess the mother and break up the family relations. And the fact that he paid taxes and made improvements on the premises gave him no interest therein: *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014.

We are of the opinion, for the reasons stated, that the circuit court erred in its judgment, and the case will therefore be remanded to that court for further proceedings in accordance herewith.

Reversed and remanded.

The Recording of a Deed is prima facie evidence of its delivery: *Brady v. Huber*, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161, and cases cited in the cross-reference note thereto; *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22, 30 South. 466; monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 547-550.

The Possession of the homestead by a widow under her right of quarantine after the death of her husband, and the subsequent possession of herself and her second husband, are not adverse to the heirs of the deceased, unless there is a denial of their rights: *Johnson v. Oldham*, 126 Ala. 309, 28 South. 486, 85 Am. St. Rep. 30, and cases cited in the cross-reference note thereto.

SMYTH v. STODDARD.

[203 Ill. 424, 67 N. E. 980.]

LANDLORD AND TENANT—Contract as to Fixtures.—If a landlord agrees to pay his tenant the reasonable value of a barn erected by the latter or allow him to remove it upon the delivery of possession under his lease, the landlord cannot insist upon a strict compliance with such contract if, by selling the leased property including the barn, he puts it beyond the tenant's power to deliver possession to him. (p. 318.)

LANDLORD AND TENANT—Conversion of Fixtures.—If a landlord agrees to pay his tenant the reasonable value of a barn erected by the latter or to allow him to remove it upon delivery of possession under his lease, a sale of the property including the barn by the landlord amounts to a conversion of the latter, and the tenant is entitled to recover its reasonable value from such landlord. (p. 319.)

LANDLORD AND TENANT—Liability of Landlord for Value of Fixtures.—If a landlord sells leased property including a barn erected by his tenant under an agreement that his landlord should pay him the reasonable value thereof on surrender of the property, the fact that such tenant afterward rents the property from the grantee of such landlord does not relieve the latter from liability to the tenant for the reasonable value of the barn as it stood at the time he made the sale. (p. 319.)

CONVERSION—Interest—Equity.—The measure of damages in trover for the conversion of property includes interest on the current value of the property, and equity follows the law in the allowance of interest. (p. 319.)

APPELLATE PRACTICE.—Objections to a Master's Report on a certain point not taken in the court below are deemed to be waived and cannot be urged on appeal. (p. 320.)

FIXTURES.—A Blacksmith-shop moved upon leased premises upon runners, left thereon, and removed thereon before the termination of the lease, does not become a fixture. (p. 320.)

FIXTURES.—Corn-cribs erected by a tenant upon leased premises upon posts sunk into the ground are fixtures as against a subsequent purchaser of the premises without notice of a verbal agreement for their removal between the grantor and such tenant. (p. 321.)

COSTS—Stenographer's Fees.—A master in chancery is not entitled to an allowance as costs for stenographer's fees for taking testimony before him. (p. 320.)

N. M. Jones, for the appellants.

Merriam & Phelps, for the appellee.

425 **BOGGS, J.** On the thirteenth day of August, 1888, appellants, Charles H. Smyth and Roger P. Chew, were the owners of a farm near La Grange, Illinois, which was occupied by the appellee, Stoddard, as their tenant, under a written lease. There stood upon the farm a stone foundation for a barn. The

appellee desired the appellants to complete the barn on this foundation. They were unwilling to comply with this request, but on said day executed a written instrument and delivered it to the appellee, authorizing him to erect, at his own expense, a covering and stalling on and over the said stone foundation. Said written instrument contained also the following agreement: "And we [the appellants] agree that whenever you [the appellee] surrender and deliver up possession of said farm to us at the expiration of any lease you may hold from us, that we will either pay you a fair consideration for said covering and stalling at such time, or we will give you a reasonable time within which to remove said covering and stalling from said stone foundation and from said premises." Under this agreement, the appellee, at his own expense, in the fall of 1888 or winter and spring of 1889, constructed a covering and stalling upon the said foundation. Stoddard's lease expired in April, 1889, and a new ⁴²⁶ lease was executed by the appellants to him which expired in April, 1892. On the twenty-fourth day of November, 1891, and while appellee was in possession of the farm under said lease from appellants which gave him the right to occupy the farm until April 30, 1892, the appellants sold the farm to one Robert C. Seyd, and assigned to Seyd the lease which they had executed to the appellee. This lease contained no reference to the agreement giving the appellee the right to remove the covering and stalling or to receive a fair consideration therefor, nor did the appellants make any reference in their deed to Seyd to the rights and interests of the appellee in the covering and stalling in the barn, nor did they inform Seyd of the agreement between themselves and Stoddard with reference to the barn. The deed from appellants to Seyd was not placed of record until March 8, 1892, and it seems that Stoddard was not advised of the change of ownership until after he had entered into an agreement with the appellants, in January or February, 1892, to renew his lease for the farm from May 1, 1892, to April 30, 1893. The appellants were nonresidents, and all of the leases and the agreement in question were executed by N. M. Jones, as their agent.

On April 5, 1893, prior to the expiration of this last lease, the appellee notified Seyd of his claim to the covering and stalling of the barn and that he intended to remove the same from the farm, and on the sixth day of April, 1893, appellee delivered to Mr. Jones, as the agent of the appellants, a written notice that as his lease was about to expire, he desired that the ap-

pellants, in pursuance of the agreement, should elect and inform him whether they would pay him for the barn built by him on said premises, or give him a reasonable time within which to remove the same, in accordance with the provisions of said contract. The notice contained the following: "I am willing, and hereby offer, to sell said barn to you for a fair consideration, or to remove the same if ⁴²⁷ I can be assured that I can have reasonable time to do so, and desire to be informed immediately whether you wish to buy the barn and how the reasonable consideration shall be ascertained, or, if you desire me to remove the same, what time you will give or secure me to remove the building in." The appellants took no action in response to this notice. Appellee leased the premises from Seyd for the term of one year.

On the first day of June, 1893, Seyd filed a bill in chancery against the appellee for an injunction restraining him from removing the structure, and a preliminary injunction was granted. Appellee filed an answer to this bill, and also his cross-bill, making the appellants parties. The appellants answered the cross-bill, in which they claimed that Seyd, when he purchased the farm of them, knew of their agreement with appellee, and that the latter was not entitled to an accounting against them, as claimed by the cross-bill, and in no event were they liable for the stalling and covering at the time it was built, but only at the time of the accounting, if any should be ordered. No steps were taken in the case until April 22, 1899, when the case was referred to the master. During this interval the appellants had filed a bill to foreclose a mortgage given to them on the farm by Seyd for an unpaid balance of the purchase price and had obtained a decree of foreclosure, had purchased the farm at a sale made thereunder and received a master's deed conveying the farm to them. On the fifteenth day of March, 1901, while the cause was on hearing before the master, the appellants filed a supplemental answer to the cross-bill of the appellee, and also filed their cross-bill, in which they averred that the appellee had wrongfully removed from the farm a corn-crib and a blacksmith-shop, and demanded that he should account to them for the value thereof, and also that he should be required to pay to them the sum of one hundred dollars for the rent of the farm for the months of February and March, 1899, under their claim ⁴²⁸ they held title to the farm for those two months. The parties produced their proofs before the master, and that official made his report, recommending, in substance, that the

preliminary injunction issued upon the original bill filed by said Seyd should be made perpetual, and that a decree should be entered in favor of the appellee, under the prayer of his cross-bill, against the appellants in the sum of three thousand two hundred and fifty-three dollars and seventy-seven cents. Objections filed to the report were overruled and a decree was entered in pursuance of the finding and report of the master, the court adding the sum of sixteen dollars and forty-one cents for interest accruing after the date of the master's report, and also decreeing that appellants should pay the cost of the proceedings. The decree was affirmed by the appellate court for the first district on appeal prosecuted by the present appellants, who have brought the case into this court by a further appeal.

The chancellor found that the appellants entered into a written agreement authorizing the appellee to construct the stalling and covering for the barn at his own expense, and binding them that at the termination of any lease he held from them, and on surrender of the premises by him, they would give him a fair consideration for the stalling and covering or allow him to remove the same within a reasonable time; that the appellants "sold and conveyed said premises to the complainant, Robert C. Seyd, without making any reservation of said covering and stalling, and that the same passed by said deed to said Seyd as part and parcel of the said realty so conveyed to him, . . . and that by the sale and conveyance of said premises to said Seyd they not only put it beyond their power to secure to Stoddard the privilege of removing said covering or stalling, but converted the same to their own use, and thereby became liable to pay said cross-complainant, Stoddard, the value of the same on the thirtieth day of April, 1893, when he became entitled to the performance of their contract with him, and interest thereafter." On these findings the chancellor perpetually ⁴²⁹ enjoined appellee from removing the stalling and covering from the farm.

The obligation of the appeal bond given by the appellants is to the appellee only. The conditions of the bond contain no reference to any portion of the decree excepting the money decree in favor of Stoddard, the appellee. The appeal is, therefore, from that branch of the decree which awards a money decree in favor of the appellee and against the appellants. The decree in other respects remains unappealed from and in full force and effect.

There is no force in appellants' contention that appellee's right to recover fair consideration for the covering and stalling

was dependent upon literal compliance, on his part, with that clause in the agreement which bound the appellants to so make payment to him only whenever he should surrender and deliver possession of the farm to appellants at the expiration or termination of any lease he should hold from them. The appellants having, during the term of the letting by them to the appellee, invested Seyd with all their interests and rights in the farm, they deprived themselves of the right to insist that they had authority to receive the possession from the appellee at the termination of that letting. He could lawfully, because of their own act, attorn to Seyd, their grantee (*Hardin v. Forsythe*, 99 Ill. 312), and for that reason, if other reasons were lacking, appellants could not escape liability by invoking a strict construction of their contract and literal compliance therewith.

If it were indispensable it should be determined whether the appellee kept the premises, under leases and extensions of leases made by appellants to him, until the thirtieth day of April, 1893, as found by the chancellor and appellate court, we should be inclined to agree with the conclusion drawn from the evidence by those tribunals. But the appellants having, by the conveyance to Seyd, authorized the appellee to deliver up the farm to Seyd at the termination of the period of any letting ⁴³⁰ by appellants, and appellee having so attorned, his right of recovery could not be defeated by the provision in the agreement that such right was dependent upon a surrender of the premises to the appellants at the termination of any lease made by them—and this without deciding that appellants' liability was dependent upon any such strict and literal construction of the contract. By the sale and conveyance of the property to Seyd the appellants rendered it impossible for them to carry out their agreement of August 13, 1888, with appellee, except by paying him the value of the covering and stalling. The appellee proceeded seasonably to give notice of his rights and to institute suit in the court to enforce them.

The only question of serious moment raised by the appeal is as to the amount fixed by the decree as a fair consideration for the stalling and covering of the barn. The chancellor was clearly correct in the view that the appellee had a right to recover the value of the barn on the thirtieth day of April, 1893. The appellants having sold the barn with the farm, and thus put it out of their power to permit the appellee to remove the structure, were properly regarded as having received the value of the barn from the purchaser of the farm and converted the same

to their own use, and hence liable to pay for the value of the barn as it stood—not its value as torn down for removal. The conversion of the barn by them constituted an election on their part to pay the appellee a “fair consideration for said covering and stalling,” to quote from the agreement. The fact that the appellee rented the farm from Seyd, and at a later period from the receiver appointed under the prayer of the bill filed by appellants for the foreclosure of the mortgage on the farm, had no effect to relieve the appellants of their liability to pay a fair consideration for the barn or to deprive the appellee of the right to receive the same. The appellee, of course, during the periods of said last-named lettings, had the benefit of the use of the barn, but he ⁴³¹ paid rent therefor to Seyd and to the receiver, respectively. The amount of a fair consideration to be paid for the covering and stalling was arrived at by ascertaining the cost of the same at the time it was built, in 1888 and 1889, and allowing for the change in the price of the material used in its construction, and deducting ten per cent for deterioration between 1888-89 and April, 1893. The witnesses testified with great particularity as to the cost of the material and labor, and at such length and with such minuteness that it would extend this opinion to an unwarranted length to discuss it in detail. We would have been better satisfied with the finding of a smaller amount, but upon a careful consideration of the testimony we find we are not able to demonstrate that the chancellor should have arrived at a different conclusion.

The twenty-sixth objection to the master's finding and report was, that one hundred dollars, being the cost of the pump, was included in the amount to be paid by the appellants under the contract. The objection was overruled, and in this we think error occurred. The pump did not constitute a part of the barn. It was placed in the well for the convenience of the appellee in caring for his stock. The undertaking of the appellants to render to the appellee a fair consideration for the barn cannot, by any fair and reasonable intendment, be construed to include the cost of the pump.

There was no error in allowing interest on the amount which appellants should pay for the barn. The transfer of the barn by the appellants to Seyd amounted to a conversion of the structure by the appellants. The proper measure of damages in actions of trover for the conversion of property includes interest on the current value of the property: *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; 3 *Sutherland on Damages*, 2405, 2406.

Equity follows the law in the allowance of interest: 16 Am. & Eng. Ency. of Law, 2d ed., 999.

⁴³² The appellants, on the first day of February, 1889, received title to the farm by deed from the master, under the foreclosure. The appellee was then in possession under a lease from the receiver, and he remained so in possession during the month of February, and, as appellants claimed, also during a portion of March. Appellants, by their cross-bill, asked for a decree against the appellee for rent for the months of February and March, at the rate of fifty dollars per month. The master required appellee to account for fifty dollars for the rent for the month of February, but made no allowance for the rent for March. It is urged it was error to refuse to require appellee to account for rent during March. Many objections and exceptions to the report of the master were filed, but none questioning the correctness of the ruling of the master on this point. The objection cannot be raised for the first time in a court of review, but must be regarded as waived: *Brainard v. Hudson*, 103 Ill. 218; *Snell v. Deland*, 136 Ill. 533, 27 N. E. 183.

It was not error to refuse to require the appellee to account for the value of the blacksmith-shop which he removed from the farm. It appeared from the testimony the appellee moved the shop to the farm by means of two poles or runners attached to the bottom of the shop, and that it was brought there to be used temporarily, and remained resting on the runners by means of which it had been moved to the farm, and was removed by dragging it away on the runners. The blacksmith-shop did not become a fixture and a part of the realty.

The master presented the following demand for his official services:

Stenographer's fees for taking testimony.....	\$82.00
Making report.....	150.00
	<hr/>
Total.....	\$232.00

The decree required the appellants to pay "the sum of two hundred and thirty-two dollars as master's fees and expenses" incurred by the master. The master should have filed an itemized statement ⁴³³ of the official services rendered by him and of the fees allowed by law for each item of service, and should not have included, in addition thereto, the amount paid to a stenographer: *Schnadt v. Davis*, 185 Ill. 476, 57 N. E. 652. In

the case cited the practice of making a charge for master's services in a gross sum was condemned. A charge in gross furnishes a convenient cover for illegal fees and for extortion, and should not be received or acted upon by the chancellor. Counsel does not, however, ask any relief from the decree as to payment of the fees allowed to the master, but urges that it was error to decree that appellants should be required to pay the amount of eighty-two dollars allowed for stenographer's fees. This charge was illegal, and the decree requiring its payment cannot be sustained.

The appellee was required by the decree to pay eighty-five dollars as the value of a corn-crib which he removed from the premises. The appellants contend that the value of the crib should have been fixed at one hundred and forty-seven dollars and eight cents, while the appellee argues, by way of cross-error, that it was error to require him to account in any sum for the crib. Appellee constructed the crib at his own expense, under a verbal agreement with one Dreyer, who then owned the farm, or a part interest therein, that he should be allowed to remove the crib. Among other reasons for holding the crib to be a part of the realty it was shown that it stood on posts, which were sunk in the earth to the depth of fifteen inches. The appellants afterward became seised of the legal title to the farm, and there is no proof they had notice or knowledge of the verbal agreement under which the appellee claimed the right to remove the crib. It passed to appellants as part of the farm. We are of the opinion that the appellee was correctly charged with the value of the building, and that the value thereof was properly fixed by the court.

It follows from what has been said it was error to include the value of the pump, one hundred dollars, in the amount which the appellants were to be required to pay as the fair ⁴³⁴ consideration for the stalling and covering of the barn, and also error to decree that appellants should pay the fees of the stenographer who reported the evidence for the master. The decree, so far as it decrees payment of the stenographer's fees, is reversed. The amount decreed to be paid by the appellants to the appellee must be reduced by the subtraction of one hundred dollars, the value of the pump, and thirty-seven dollars and ninety-eight cents interest thereon, at five per cent, from April 30, 1893, to the date of the decree (interest having been allowed on that sum at that rate for that period of time), leaving three thousand one hundred and thirty-two dollars and twenty cents, for which the

appellee should have a decree. The decree will be affirmed for that amount, at the cost of the appellee.

Affirmed in part and in part reversed.

What are Fixtures is the subject of a monographic note to Gray v. Holdship, 17 Am. Dec. 686-696. And when a tenant may remove fixtures is the subject of a monographic note to Holmes v. Tremper, 11 Am. Dec. 241-244. The general tests of a fixture are: 1. Actual annexation to the realty or some appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is put; and 3. The intention of the parties making the annexation to make a permanent accession to the freehold: Baker v. McClurg, 198 Ill. 28, 92 Am. St. Rep. 261, 64 N. E. 701. See, also, Sherrick v. Cotter, 28 Wash. 25, 92 Am. St. Rep. 821, 68 Pac. 172; Illinois Cent. R. R. Co. v. Hoskins, 80 Miss. 730, 92 Am. St. Rep. 612, 32 South. 150; Salley v. Robinson, 96 Me. 474, 90 Am. St. Rep. 410, 52 Atl. 930; McFarlane v. Foley, 27 Ind. App. 484, 60 N. E. 357, 87 Am. St. Rep. 264, and cases cited in the cross-reference note thereto. It is held that a wooden structure or building resting on flat stones laid upon the surface of the ground is not a fixture: Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301. Compare State Sav. Bank v. Kircheval, 65 Mo. 682, 27 Am. Rep. 310. Nor is a portable sugarmill or sawmill: Winslow v. Bromich, 54 Kan. 300, 45 Am. St. Rep. 285, 38 Pac. 275; Lansing Iron etc. Works v. Walker, 91 Mich. 409, 30 Am. St. Rep. 438, 51 N. W. 1061. But platform scales are fixtures: Thomson v. Smith, 111 Iowa, 718, 82 Am. St. Rep. 541, 83 N. W. 789.

Fixtures, Agreement as to.—The owner of real estate may agree with his tenant that the latter may affix or erect anything on the premises and have the right to remove it. In that event the chattel does not become a fixture, but continues the personal property of the tenant: Broadus v. Smith, 121 Ala. 335, 26 South. 34, 77 Am. St. Rep. 61, and authorities cited in the cross-reference note thereto. As to the rights of the parties and of third persons in such cases, see the monographic note to Fuller-Warren Co. v. Harter, 84 Am. St. Rep. 877-901.

POTTER v. CLAPP.

[203 Ill. 592, 68 N. E. 81.]

MARRIAGE.—Cohabitation Meretricious in Its Inception is presumed to continue such until proved to have become matrimonial by direct or circumstantial evidence or by a subsequent lawful marriage between the parties. (p. 323.)

MARRIAGE—When Void.—Marriage between parties, when either has a lawful wife or husband living, is absolutely void. (p. 324.)

MARRIAGE—Attack upon—Burden of Proof.—A second marriage being shown as a fact a strong presumption is raised in favor of its legality, which is not overcome by mere proof of a prior marriage, and that the first wife has not obtained a divorce. The party attacking the second marriage has the burden of proof to show that neither party thereto has obtained a divorce. (p. 325.)

MARRIAGE—Validity—Res Judicata.—If heirs contest the widow's allowance upon the ground that she was not lawfully married to their father, an award of such allowance is a finding in favor of the validity of such marriage and binding upon the heirs until reversed in a direct proceeding. (p. 326.)

TRUSTS.—Resulting trusts arise by implication of law and cannot grow out of a contract to hold the title for a third person who advances the purchase money. (p. 328.)

TRUSTS.—Express trusts do not rest in parol but must be evidenced by writing. (p. 328.)

HOMESTEAD IN FLATS.—A homestead in a flat or apartment house is confined to the flat or apartment occupied as a residence, provided its value is equal to the homestead exemption. (p. 329.)

HOMESTEAD IN FLATS.—If a householder occupies a flat in a flat-building or an apartment in an apartment house as his homestead, his residence is as much disconnected from the other flats or apartments located in the same building as though the portion thereof occupied by him were located upon a different lot or under a different roof. (p. 329.)

HOMESTEAD IN FLATS—Accounting for Surplus Rents.—If a widow remains in possession of a flat under an agreement with the heirs, that pending a settlement of their respective rights, she shall occupy the lower flat as her homestead, rent the upper flat and account therefor to the heirs, she may be held to such an accounting. (p. 329.)

DOWER as Between First and Second Wives.—If a divorced wife is entitled to dower, she takes it subject to the homestead of the second wife, and the latter takes dower subject to the dower estate of the first wife and to her own homestead right. (p. 330.)

DOWER—Demand for.—A contract between a widow and heirs, whereby she is to remain in possession of the estate and collect rents pending a settlement of the respective rights of the parties, makes a demand for dower on her part unnecessary. (p. 330.)

EQUITY JURISDICTION.—While equity will not ordinarily assume jurisdiction over the settlement of decedent's estates, yet it may do so in a proper case. (p. 331.)

F. P. Read, for the appellants.

A. N. Tagert, for the appellee.

598 HAND, C. J. The first question which is presented for consideration upon this record is, Was the complainant, Mary Ann Clapp, the lawful wife of James H. Clapp at the time of his death? It clearly appears that the time James H. Clapp and Mary Ann commenced living together in the city of Chicago, ostensibly as husband and wife, James H. Clapp had a lawful wife then living and that Mary Ann had a lawful husband then living. Their cohabitation was therefore meretricious in its inception, and the presumption of law is that it so continued so long as they continued to live and cohabit together, unless the proof shows that the evil purpose of the parties subsequently

changed and that the cohabitation lost its unlawful character and became matrimonial in its intent and character, which intent and character may be shown by direct or circumstantial proof, and would be evidenced by a lawful marriage between the parties subsequent to the removal of the disability of each to enter into a lawful ⁵⁹⁹ marriage contract: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Manning v. Spurek*, 199 Ill. 447, 65 N. E. 342. At the time of the ceremonial marriage between James H. Clapp and Mary Ann, on the twenty-first day of July, 1885, William S. Seamans, the former husband of Mary Ann, had died, and the impediment to her marriage had been removed. The wife of James H. Clapp, however, was then living, and she did not become divorced from him until more than two years after that date, and was still his lawful wife unless he had before the date of said ceremonial marriage been divorced from her, as the rule universally recognized by the courts is, that a marriage between parties, where either the man or the woman has a lawful wife or husband living at the time of the marriage, is absolutely void: *Schmisser v. Beatrie*, 147 Ill. 210, 35 N. E. 525. True it is, at the time of the marriage of the parties in the state of Maine the proof does not show that Mary Ann then knew that James H. Clapp had a lawful wife living, but Clapp knew that fact unless he had been divorced from her, and his knowledge made the continuation of the relation between the parties meretricious, and the ceremonial marriage on the 21st of July, 1885, between the parties was void unless James H. Clapp had been before that time divorced from Mary M. Clapp. Mary M. Clapp did not obtain a divorce from Clapp at her suit until in October, 1887, but the record is silent as to the fact whether or not James H. Clapp, prior to the time of the ceremonial marriage with Mary Ann, had been divorced from Mary M. In *Cartwright v. McGown*, 121 Ill. 396, 2 Am. St. Rep. 105, 12 N. E. 738, it was said: "When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed."

As Mary M. was living in 1885, the presumption is that James H. Clapp had been divorced from her prior to the celebration of his marriage to Mary Ann on the twenty-first ⁶⁰⁰ day of July, 1885. The effect of this presumption was to cast the burden upon the defendants, who are attacking said marriage in this

suit, to rebut such presumption. In *Coal Run Coal Co. v. Jones*, 127 Ill. 379, on page 386, 8 N. E. 865, 869, it was said: "The second marriage being shown in fact, the law raises a strong presumption in favor of its legality, which we do not regard as overcome by mere proof of a prior marriage and that the first wife had not obtained a divorce: See *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232. The husband might have obtained such divorce and left him free to contract the second marriage." And in *Schmisser v. Beatrice*, 147 Ill. 215, 35 N. E. 526, the court said: "The two marriages of Nicholas Beatrice, Jr., and the existence of the first wife at the time of the second marriage being established by proof, the presumption would arise in favor of a divorce from his first wife in order to sustain the second marriage. In view of this presumption the burden of proof rested upon the appellants, as the objecting parties, to show that there had been no divorce. The law is so positive in requiring a party who asserts the illegality of a marriage to take the burden of proving it, that such requirement is enforced even though it involves the proving of a negative."

It is said, however, if it be conceded that the burden of proof was upon the defendants to rebut the presumption that James H. Clapp had been divorced from Mary M. prior to the celebration of his marriage with Mary Ann, in 1885, as the proof shows that James H. Clapp abandoned his wife Mary M., and that he had no grounds for divorce and could not have legally obtained a divorce from her, such presumption is rebutted—citing *Cole v. Cole*, 153 Ill. 585, 38 N. E. 703, and other cases. The only evidence in the record in support of such contention is that of the defendants Annie L. Wilcox and Albert G. Clapp. Mrs. Wilcox testified: "I did not know what had become of my father for a period of twelve years. The trouble at the time my father deserted my mother and his children ⁶⁰¹ was between my sister's intended husband—nothing that I know of on my mother's account. He didn't tell me or any other member of his family where he was going when he left on September 20, 1875." Albert testified: "He ceased to live with my mother upon general dissatisfaction with business and relatives in Providence—not through any fault in my mother." It must be remembered that said defendants were young at the time their mother and father separated, and that they naturally sympathized with the mother. They are parties to and directly interested in the result of this suit, and their testimony, in the nature of things, would be adverse to the complainant. James

H. Clapp and Mary M. had been living apart for ten years prior to his marriage to Mary Ann, in 1885. He was a business man, and necessarily had some experience in the ways of the world and knew something of the law, and it would hardly be presumed that he would enter blindly into a marriage with the complainant at a time when he knew he had a lawful wife, the effect of which would be to subject him to a prosecution for bigamy. The parties lived together openly as husband and wife for two years after the marriage in 1885 and prior to the divorce of Mary M. in 1887, and thereafter continued to live together until his death, in 1897, the complainant during all that time, so far as the evidence shows, resting secure in the belief that she was the lawful wife of James H. Clapp. After the death of Seamans there was no legal impediment to the marriage of James H. Clapp and Mary Ann Clapp so far as she knew, and subsequent to the marriage in 1885 they lived together as husband and wife for a period of twelve years and until the death of Clapp. They held themselves out to the world as husband and wife and were recognized as such by their friends and relatives. Clapp wrote and spoke to his children of the complainant as his wife. The defendant Albert G. visited at his father's home with his bride upon his wedding trip, in 1888. Mrs. Wilcox ⁶⁰² visited the World's Fair in 1893, and she and her husband stopped at her father's house for some length of time. At the time of the death of James H. Clapp, Albert G. attended the funeral, recognized the right of the complainant, as widow, to administer upon his father's estate, and the probate court, without objection on the part of the defendants, appointed her administratrix thereof. In the title deeds under which the father held the property which the defendants inherit from him, the complainant is designated as the wife of James H. Clapp.

In view of all these facts and circumstances, we think the master and the chancellor were justified in holding that the evidence of Mrs. Wilcox and Albert G. Clapp, given after the death of James H. Clapp, was not sufficient to overcome the presumption that James H. Clapp had been divorced from Mary M. Clapp prior to his marriage to Mary Ann Clapp in July, 1885. Furthermore, while the proceeding in the probate court of Cook county for the allowance of an award to the complainant was pending, the defendants, as heirs of James H. Clapp, appeared by attorney and contested her right to an award upon the ground that she was not lawfully married to James H. Clapp and was therefore not his widow. The court held against them upon that

proposition, and allowed the complainant, as widow of James H. Clapp, a widow's award out of his estate. The precise question presented here was presented there. The heirs of James H. Clapp had the right to appeal from that order, and having failed to do so, we think they are bound by the adjudication there made and cannot now attack that finding and judgment collaterally. The proceeding was, in effect, between Mary Ann Clapp and the heirs of James H. Clapp, deceased, and affected their interests only. The probate court had jurisdiction of the parties and the subject matter of the suit, and the court, in allowing to the widow an award, necessarily held that she was the lawful widow of James H. Clapp, deceased, and that judgment ⁶⁰³ is binding upon the heirs until reversed in a direct proceeding. In *Hanna v. Read*, 102 Ill. 596, on page 602, 40 Am. Rep. 608, the court said: "Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law, as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense. . . . Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in a cause, the fundamental principle upon which it is allowed in either case is, that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties, where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication."

The evidence shows that at about the time complainant left Rhode Island she had in cash fourteen hundred and thirty-seven dollars and thirty-one cents. What she did with it does not appear. At the time the real estate was purchased, in 1883, a cash payment of two thousand six hundred and sixty-six dollars and sixty-six cents was made thereon and an encumbrance of thirteen hundred and thirty-three dollars and thirty-four cents was assumed. The title thereto was taken in the name of Mary A. Clapp. In 1885 she conveyed said premises to James H.

Clapp through Henry D. Nichols, and the title rested in him at the time of his death. As we understand the contention of the complainant, it is claimed that James H. Clapp held said premises in trust for Mary Ann Clapp to the extent that her funds entered into the payment of ⁶⁰⁴ the purchase money therefor, which it is said was to the extent of two thousand dollars. A number of witnesses testified that James H. Clapp had stated to them he was indebted to his wife, Mary Ann Clapp, in various sums, ranging in amounts from two thousand dollars to four thousand dollars. There is, however, no evidence in the record which tends to support a resulting trust in her favor in said real estate. A resulting trust arises by implication of law, and does not grow out of a contract. The title to the real estate was taken in the name of Mary Ann Clapp at the time of the purchase, and in 1885 she conveyed the title to James H. Clapp, and even though it were conceded at that time he agreed to hold it for her benefit or to reconvey it to her, as the bill alleges, such contract or agreement, unless evidenced in writing, would be within the statute of frauds and not enforceable, where the statute, as here, is pleaded. Express trusts do not rest in parol, but must be evidenced in writing. The chancellor allowed the complainant, in the statement of the account between the parties, the sum of eight hundred dollars as due her for money loaned to James H. Clapp. We think this amount as a claim for money loaned fairly sustained by the evidence, and would not be disposed to disturb such finding were it for a larger amount, as we are impressed the money of Mary Ann Clapp went into said real estate, and James H. Clapp recognized the same as an existing obligation as late as a year prior to his death.

The evidence further shows that lot 30 is improved with a three-story brick flat-building, and that lot 31 is improved with a two-story frame building consisting of two flats, the lower of which was occupied by James H. Clapp and family and is now occupied by complainant as a homestead, and the upper of which was rented by him, and has been occupied, at least a part of the time, by tenants since his death; also by a frame cottage upon the rear portion thereof, which is also occupied by a tenant. The complainant remained in possession of all of said premises and collected rents therefor until about ⁶⁰⁵ September 1, 1900, when the heirs of James H. Clapp recovered possession thereof through an action of forcible detainer, with the exception of the

two-story frame building, and have collected the rents therefor since that time. The court held, in stating the account between the parties, that the complainant was entitled to the possession of both flats in said frame building as her homestead, after the death of James H. Clapp, and refused to require her to account for the rent collected by her for the upper flat—the one not occupied by her as a homestead. The portion of the building occupied by her was of much greater value than one thousand dollars, and we are of the opinion, especially in view of her understanding with Albert G. Clapp that she would rent the premises and that her rights and the rights of the heirs would be subsequently adjudicated, that there was error in refusing to require her to account for the rent of said flat. In case a householder occupies a flat in a flat-building, or an apartment in an apartment building, as a homestead, his residence is as much disconnected from the other flats or apartments located in said building as though the portion thereof occupied by him was located upon a different lot or under a different roof; and while in a case like this it might work no great harm to hold the widow, after the death of the householder, might rightfully retain the possession of the entire building until her homestead was assigned, if the principle were applied to a building containing, as is often the case in large cities, many flats or apartments, it would lead to absurd results. Especially would that be true where the widow remained in the apartment with the understanding that she would rent the balance of the premises and account to the heirs for the rent, and it seems clear to us that the complainant should have been required to account for the rents which she collected upon the upper flat in the frame building, subsequent to James H. Clapp's death. In *Tiernan v. Creditors*, 62 Cal. 286, it was held that in the case of a ⁶⁰⁶ double house on a city lot intended for two families, one part of which was leased to a tenant and the other occupied by the owner, the owner could not claim as a homestead that portion of the building not occupied by him; and in *Dyson v. Sheley*, 11 Mich. 527, it was held that in order that premises may be exempted as a homestead, they must be set apart as a homestead for the purposes of the owner and his family, and where the owner of a city lot built a double house upon it in such a way as to show that he designated it for the use of two families and not for one, and leased one part of it and occupied the other himself, that he could not claim the latter as exempt from execution sale as a homestead, and that the fact that the

yard of the part leased was used by the owner in common with the tenant would not vary the case. To the same effect are *Rhodes, Pegram & Co. v. McCormack*, 4 Iowa, 368, 68 Am. Dec. 663, and *Mayfield v. Marsden*, 59 Iowa, 517, 13 N. W. 652.

We are also of the opinion that the court erred in decreeing that the complainant Mary Ann Clapp, was entitled to dower in said real estate absolutely, and not subject to the right of dower therein of Mary M. Clapp. The court held Mary M. Clapp was entitled to dower in said real estate, and that part of the decree has not been questioned. The decree should have first provided that Mary Ann Clapp recover an estate of the value of one thousand dollars in the portion of the real estate occupied by James H. Clapp at the time of his death, as a homestead; that Mary M. Clapp recover dower in said real estate subject to the homestead therein of Mary Ann Clapp, and that Mary Ann Clapp recover dower therein subject to her homestead estate and the dower estate of Mary M. Clapp (*Stahl v. Stahl*, 114 Ill. 375, 2 N. E. 160), that is, first, a homestead of the value of one thousand dollars should have been set off to Mary Ann Clapp; second, one-third in value of the real estate remaining should have been assigned to Mary M. Clapp as her dower; and third, one-third of the real estate remaining should have been assigned to Mary Ann Clapp ⁶⁰⁷ as her dower, and in case she survived Mary M. Clapp she would be endowable of one-third of the portion assigned to Mary M. Clapp as dower in addition to the amount already assigned to her.

In the division of rents, after deducting the homestead, Mary M. Clapp should receive the one-third part thereof from the time she intervened, and Mary Ann Clapp should receive one-third of two-thirds of the rent from the date of the death of James H. Clapp. The agreement with Albert G. Clapp, one of the heirs, whereby she was to remain in possession of the property and collect the rents, made a demand for dower on her part unnecessary: *Strawn v. Strawn*, 50 Ill. 256.

The only estate of which James H. Clapp died seised is the real estate described in this bill, and whether debts and claims, including the widow's award and the expenses of administration, that are legally provable against his estate must be paid from the income thereof or a sale of the whole or a part of the said real estate, and as the complainant is the only creditor and she and the defendants are the only persons interested in said estate, we see no objection to a full settlement and adjustment in this suit of all claims or matters in difference between them relative

to said estate and to a full determination of their interest in said real estate, including the adjustment of rents arising therefrom and improvements made thereon. While equity will not ordinarily take upon itself the settlement of the estate of deceased persons, in a proper case it may assume such jurisdiction, and this case seems to fall within the class of cases where such jurisdiction may be assumed.

Upon the case being reinstated below, it should be re-referred to the master to state an account between the parties as to the rents and profits which have accrued from said real estate since the death of said James H. Clapp, and the parties should be charged with the rents collected by them, respectively, and credited with the ⁶⁰⁸ amounts they have rightfully paid out in improving or preserving said real estate, including the expenses incurred by the complainant in completing said cottage, and the complainant should be credited with the several amounts allowed her for money loaned, widow's award, expenses of administration, and the balance found to be due her decreed to be a lien upon said real estate, and a decree entered fully settling the rights of the parties in said real estate.

The decree will therefore be affirmed in part and reversed in part and remanded to the circuit court, with directions to proceed to a final determination of the case in accordance with the views herein expressed, and the complainant will pay one-third and the defendants two-thirds of the costs occasioned by this appeal.

Decree reversed in part, and remanded.

Void Marriages.—What marriages are void is the subject of a monographic note to *State v. Lowell*, 79 Am. St. Rep. 361-384. A marriage contracted when one of the parties has a former spouse living from which no divorce has been had is void: See the monographic note to *Gathings v. Williams*, 44 Am. Dec. 54, on void and voidable marriages. As to the effect on the rights of the parties of a void marriage, see the monographic note to *Deeds v. Strode*, ante, pp. 267-277.

The Presumption, in Case of a Second Marriage, that the former marriage has been dissolved by death or divorce, is considered in the monographic note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198-206.

A *Homestead* can be claimed only in the part of the house occupied by the owner, where it is a double house with distinct entrances, occupied in part by the owner and in part by a tenant: See the monographic note to *Pryor v. Stone*, 70 Am. Dec. 350. Consult, also, *Cass County Bank v. Weber*, 83 Iowa, 63, 32 Am. St. Rep. 288, 43 N. W. 1067; *Kiesel v. Clemens*, 6 Idaho, 444, ante, p. 278, 56 Pac. 84.

The Assignment of Dower is the subject of a monographic note to *Sanders v. McMillian*, 39 Am. St. Rep. 25-39. In this note will be

found a discussion of the question as to who is entitled to dower. It has been held that a divorce bars all claim to dower: *Wood v. Wood*, 59 Ark. 441, 43 Am. St. Rep. 42, 27 S. W. 641; *Carr v. Carr*, 92 Ky. 552, 36 Am. St. Rep. 614, 18 S. W. 453. But see *Van Cleaf v. Burns*, 118 N. Y. 549, 16 Am. St. Rep. 782, 23 N. E. 881.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

KIBBEY v. RICHARDS.

[30 Ind. App. 101, 65 N. E. 541.]

EASEMENTS—Private Ways by Prescription.—A private way by prescription can be acquired only by a continuous, uninterrupted, adverse use of the way under a claim of right, and with the knowledge and acquiescence of the owner of the land. Permissive use is not sufficient to establish a prescriptive right. (p. 324.)

J. A. Kersey, for the appellant.

F. Davis, for the appellee.

102 **ROBINSON, J.** Appellant in his complaint avers that he is the owner in fee and in possession of a certain described tract of land; that the same is all the land he owns, and that there is no public highway bordering thereon or coming thereto from any direction; that for more than thirty years there has been a private way running east from the southeast corner of appellant's land to a gravel road; that this way is and for more than thirty years has been thirty feet in width; that appellee is, and during all of this time has been, the owner of the land abutting on this way on the north side thereof, and his fence dividing it from his land during all this time has been fifteen feet north of the center line thereof; and that he has at all times acquiesced in and recognized the right of appellant and his predecessors in the title to and ownership of such land to use this private way in its full width; and up to his fence fifteen feet north of the center of the way. It is further averred that on or about December, 1899, appellee moved his fence thirteen feet south, and into this way throughout its entire

length, thereby destroying appellant's easement and way, and thereby cutting the plaintiff off from all ingress to and egress from his land, creating and constituting a nuisance which is irreparably injurious to appellant, and thereby rendering his land of no value. A trial by jury resulted in a verdict in appellee's favor, upon which, over appellant's motion for a new trial, judgment was rendered. As stated in appellant's brief, "the issue was simply whether or not the road had been established and used as such long enough to constitute a road and entitle the appellant to insist on its remaining."

The only question argued is that the verdict is contrary to the evidence. A person may acquire a private right of way over the lands of another by prescription. The use ¹⁰³ of the way must have been continuous, uninterrupted and adverse, under a claim of right, and with the knowledge and acquiescence of the owner of the land. Such use must not at any time have been interrupted by the act of the owner of the land, nor abandoned by the party claiming the right. "If," said the court in *Fankboner v. Corder*, 127 Ind. 164, 166, 26 N. E. 767, "there has been the use of an easement of twenty years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." If, on the facts pleaded, appellant had no more than a license to use the land of appellee, such license was revocable at the will of the person granting it, as it does not appear that any consideration was paid for it, or that any value was parted with on the faith that the license was perpetual: *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Clauser v. Jones*, 100 Ind. 123; *Malott v. Price*, 109 Ind. 22, 9 N. E. 718; *Wiseman v. Luck-singer*, 84 N. Y. 31, 38 Am. Rep. 479.

A land owner parts with none of his rights by simply permitting another to pass over his land. Permissive use is not sufficient to establish a prescriptive right. "The use of land," said the court in *Parish v. Kaspore*, 109 Ind. 586, 10 N. E. 109, "for the purpose of passing over it is not inconsistent with the right of ownership, and where there is no inconsistency between the use and the ownership, there can be no prescriptive right. It is not necessary, to establish a prescriptive easement, that there should be color of title; but it is necessary that the use should be under an assertion of right, and not simply a user under a naked license": See *Hill v. Hagaman*, 84 Ind. 287.

There is evidence to show that appellee first opened the way

for his own convenience, and that it was originally intended and used for a way for stock to pass to and from the highway. The evidence shows no more than the permissive ¹⁰⁴ use of the way; that when appellant was placing gravel on the way appellee notified him not to place any on his side of the lane, as he intended to move the fence and close it. We think it sufficiently appears, from all the facts and circumstances proved, that appellee always claimed the right to close the way; that appellant's use of the way was simply permissive; and that by such use appellee parted with none of his rights.

There is no error in the record.

Judgment affirmed.

The Holding of the Principal Case is supported by *Jesse French Piano etc. Co. v. Forbes*, 129 Ala. 471, 29 South. 683, 87 Am. St. Rep. 71, and cases cited in the cross-reference note thereto. As to the rights and obligations of parties to private ways, see the monographic notes to *Dudgeon v. Bronson*, 95 Am. St. Rep. 318-330; *Welch v. Wilcox*, 100 Am. Dec. 115-119.

COMER v. HAYWORTH.

[30 Ind. App. 144, 65 N. E. 595.]

MARRIED WOMEN—Separate Property—Conversion of—Liability for.—If a draft in payment for a married woman's separate property is made payable to a third person for her use, and is by him, without her consent, assigned to her husband's partner and upon the husband's order, without consideration, is credited to him and used in the partnership business, both he and his partner are liable to her for the money as had and received for her use. (p. 340.)

W. Spangler, J. M. Spangler, J. M. Fuller and H. R. Robbins, for the appellant.

C. W. Barker, G. Burson and J. C. Nye, for the appellee.

¹⁴⁴ BLACK, P. J. The complaint of Margaret A. Comer, appellant, against John R. Hayworth, appellee, consisted of two paragraphs. In the first it was alleged that the appellant about April 1, 1894, was the owner and entitled to the possession of a certain draft for eight hundred dollars, issued in payment for her farm, and made payable to William R. Jones, for her use; that Jones assigned the draft to the appellee, who drew the money thereon, and, without her knowledge or consent,

wrongfully and unlawfully converted the money to his own use, to her damage in the sum of, etc., for which she made demand on the appellee before suit, but he refused ¹⁴⁵ to pay, etc. In the second paragraph it was alleged that in the year 1894 the appellant was the owner of a tract of land in Jasper county, Indiana, which she sold and conveyed to William A. Rhinehart, who paid the money arising therefrom to William R. Jones, who, without her consent, or authority from her, paid eight hundred dollars of the money so received from Rhinehart for the appellant to the appellee, who received the same without any right thereto, and, though she demanded the same from the appellee, he still retained it, and wholly failed to pay it to the appellant, wherefore, etc.

It is assigned here that the court erred in overruling the appellant's demurrer to the third paragraph of answer. In that paragraph, addressed to the entire complaint, it was alleged that in the year 1890 the appellee and the appellant's husband, William Comer, with W. R. Jones, entered into partnership for the purpose of buying and selling cattle and other livestock, and continued until June, 1892, when Jones retired from the firm, and thereafter the appellee and the appellant's husband continued in partnership, and continued to carry on that business until they finally dissolved partnership, the date of dissolution not being stated; that when these persons went into partnership, in 1890, William Comer was the owner of the land mentioned in the complaint, which the appellee then knew; that on December 24, 1891, William Comer—his wife, the appellant, joining him—conveyed the land to their daughter and her husband (named), without consideration, and these grantees on the same day, without consideration, conveyed the land to the appellant; that appellee was never informed and did not know of this transaction until long after it had taken place, and was not informed and did not know that the appellant owned or claimed to own the land; that the appellee, while admitting that he received the sum of eight hundred dollars of William R. Jones, substantially as alleged in the complaint, says that the same was received by him under ¹⁴⁶ the following circumstances: At the time he received the money he was treasurer and custodian of the funds of the firm of Hayworth & Comer, doing business as aforesaid, and the money was paid in by order of appellant's husband, to be used by the firm as partnership money, and when appellee received the money it was placed to the credit of appellant's husband on the books

of the firm, and was used by the firm in carrying on and conducting their said business, and the appellee received the money in no other manner and for no other purpose than as above stated; that at the time he received the money, and gave Comer credit therefor on the partnership account, he was not informed and did not know that the appellant was the owner or claimed any interest in the money, or that she was the owner or claimed to be the owner of the land for the sale of which the money was received by the said Comer; that the money was paid out by the firm in buying and dealing in stock, and when this firm was dissolved, "Comer was and had received credit for said funds," and the money was never used or expended by the appellee as his own separate money or in his private business.

The case presented by this answer in connection with the complaint is, briefly, that Hayworth received from Jones eight hundred dollars, of which Mrs. Comer was the owner, it being the proceeds of the sale of her land, held as such by Jones in money, or in the form of a draft made payable to Jones. The money so received by appellee was paid in by order of William Comer—to whom addressed is not stated—to be used as partnership money of a firm composed of Hayworth and William Comer. When Hayworth received it from Jones it was credited to William Comer on the partnership books, and was used by the firm in the partnership business, Hayworth not being informed when he received the money, and gave his partner credit therefor, that it was Mrs. Comer's money, or that she owned or claimed the land from the sale of which it was derived.

147 It does not clearly appear from the answer whether the appellee received the draft, or the amount thereof in money. What he received he obtained from Jones. It is not shown that any consideration passed to the appellant or to Jones, or that appellee's partner—appellant's husband—was indebted to appellee upon a balancing of partnership accounts, and that the sum so received was paid in for the purpose of paying off any obligation to the appellee as a partner. It was credited to appellant's husband on the books of the firm, but it was paid in as partnership money, to be used in the partnership business; that is, as money belonging, with all other partnership property, to the partnership, and therefore to all the members of the firm, as their interests, upon an adjustment of partnership matters, might disclose.

It is alleged that appellee did not know that the money belonged to the appellant, or that she owned the land from the

sale of which the money was derived; but it is not alleged that he did not know of the sale of the land, or that he did not know that the money was derived therefrom, or that he had been informed that the money belonged to his partner, or that he believed it to belong to his partner, or that he made any inquiries or investigation concerning the ownership of the draft or the money. The draft or the money was in the possession of Jones, who held it as the property of appellant. It passed from the possession of Jones, not to the possession of appellant's husband, but directly to the appellee. It never was in the possession of appellee's partner, except as it may be said to have been in his possession as a partner after it had been appropriated as partnership money. The money belonging to the appellant was thus appropriated without her knowledge or consent.

Where one person appropriates the money or property of another, without the knowledge or consent of the owner, the appropriation is wrongful, and an action may be maintained for its recovery without previous demand: *Armacost v. Lindley*, 116 Ind. 295, 296, 19 N. E. 138.

148 Where one person has received money for the use of another, with the knowledge and consent of the latter, and after its receipt has wrongfully converted the money to his own use, or to the use of himself and a third person, an action will lie for the recovery of the money without a demand before suit: *Terrell v. Butterfield*, 92 Ind. 1.

Where a husband takes possession of the corpus or principal of the separate property or money of his wife, he is presumed, under our law, to hold it for her use and benefit, until this presumption is overcome by proof of her intent to make a gift of the property to him. The burden is upon him to show that his appropriation of the property was in accordance with her direction, or that she gave it to him. Where she never acquired actual dominion over such money or possession thereof, he having collected and appropriated it to his own use, the fact that he collected and received it with her consent would not raise a presumption that she intended to give it to him: *Denny v. Denny*, 123 Ind. 240, 23 N. E. 519.

If the husband took the wife's property with her consent, unless the facts and circumstances show an agreement, or an intention on her part that he shall have it as a gift, he will be presumed to have taken it as her agent or trustee. In such case she may declare against him, not for conversion, but for money had and received to her use: *Armacost v. Lindley*, 116

Ind. 295, 19 N. E. 138; Parrett v. Palmer, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713.

If the appellant had loaned the money to her husband alone, the credit therefor being given by her knowingly and voluntarily to him individually, the firm or the appellee would not have been liable for the money, though it were put into the partnership by the husband and used for the purposes of the firm. In such case her contract would be unconnected with the application or use of the money by the borrower, and she would be the creditor of the person with whom she contracted, without regard to the partnership.

149 If money, which has no earmarks, being in the possession of the husband of the owner thereof, were by him, in breach of trust, paid into the partnership of which he was a member, and used as partnership money, the right of the wife to recover of the firm or her husband's partner would not be affected by the fact of her being the wife of the trustee who so misappropriated the money. In any other case of like breach of individual trust by a partner, by the misappropriation of trust money to the use of the partnership, the right of another partner to relief from liability to the cestui que trust would depend upon equitable considerations—not alone on the question whether or not he was ignorant of the source from which the money was derived, and innocent in the matter of its misappropriation, but also upon the question whether or not, under the circumstances, it could be said that as to him there was a consideration for the payment of the money, amounting to the parting with value therefor by him, and further, upon the question whether he exercised that diligence required of one who seeks the protection of equity, by making such inquiries and investigations as to the source of the money as would indicate due business diligence. If this were such a case, it would be worthy of remark that the money in question was put into the partnership after the firm had existed several years, and though the appellee's partner had no apparent right or title or indicia of ownership, it does not appear that the appellee made any exertion whatever to ascertain the true ownership of the money or draft, or as to the reason why it was in the possession of Jones, or that he ever manifested any curiosity in the matter: See *In re Ketchum*, 1 Fed. 815.

But the case before us cannot properly be characterized as one involving such a breach of trust on the part of appellee's partner. He did not obtain possession of his wife's money and invest it in the partnership business. The money never was in the in-

dividual possession of appellant's ¹⁵⁰ husband. He, as he himself knew, had no interest in the money, or right to control its disposition. It belonged to the appellant, and without her knowledge or consent it was received from Jones by the appellee, on the order, it is said, of his partner. Neither the firm nor any of its members parted with anything of value for the money. The appellant did nothing to induce the appellee to change his condition, and it does not appear that she stood by, knowing that the appellee was changing his condition, without disclosing her interest. By the co-operation of the partners the firm appropriated the appellant's money and devoted it to the partnership purposes, one of the partners taking it into his possession for such purpose upon the order of the other, who did not hold possession thereof, and who had no right therein, real or apparent. The appellant, the owner of the money or draft thus taken and used, had not conferred any trust or bestowed any confidence on her husband, the appellee's partner, or done or said anything on which the appellee could claim a right to rely as an equitable estoppel. Even if the appellee supposed the money to be the property of his partner, or that he had the right to dispose of it, and if the answer had so alleged, such belief on his part is not shown to have been authorized by the appellant, and she was in no way responsible therefor. Having thus appropriated and used the money, the firm, and therefore each of the partners, were responsible as for money had and received to her use. The third paragraph of answer was insufficient on demurrer.

Judgment reversed.

If the Property of a Married Woman passes into the possession and control of her husband with her consent, it must be presumed that it is not a gift, but that he takes the property as trustee, although there is no express promise to repay: *King v. King*, 24 Ind. App. 598, 79 Am. St. Rep. 287, 57 N. E. 275. See, also, *Adoue v. Spencer*, 62 N. J. Eq. 782, 90 Am. St. Rep. 484, 49 Atl. 10. But money of hers received by him and with her consent invested in land in his own name, is prima facie a gift: *Crumrine v. Crumrine*, 50 W. Va. 226, 88 Am. St. Rep. 859, 40 S. E. 341. In *Riley v. Vaughan*, 116 Mo. 169, 38 Mo. 586, 22 S. W. 707, it is held that the reception and use by him of the proceeds of her land implies a promise to repay her, and creates, as between them, a valid indebtedness.

DUZAN v. MYERS.

[30 Ind. App. 227, 65 N. E. 1046.]

DEATH FROM WRONGFUL ACT—Distribution of Damages for.—The fact that the complaint in an action for damages for death by wrongful act omits to name the children by a former marriage does not deprive them of the right to share in the damages recovered for the death of their father. (pp. 344, 345.)

DEATH FROM WRONGFUL ACT—Damages—Distribution—Emancipation of Child.—Although a son is practically emancipated and has been living with, and supported by, a third person for a number of years, this does not prevent the son from sharing in damages recovered for the death of his father. (p. 346.)

DEATH BY WRONGFUL ACT—Damages—Distribution—Adult Child.—An adult who has been living away from home for a number of years, and has been given but slight support by her father is entitled to share in damages recovered for his death by wrongful act. (pp. 347, 348.)

APPELLATE PRACTICE.—Mere Exceptions to a Judgment cannot be reviewed on appeal. (p. 348.)

W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for the appellant.

C. B. Clarke and W. C. Clarke, for the appellees.

²²⁷ COMSTOCK, J. On the thirtieth day of November, 1898, this appellant, then the widow of Henry D. Myers, deceased, was appointed administratrix of his estate. As such administratrix the appellant filed her complaint in the superior ²²⁸ court of Marion county against William C. Scofield, Charles W. Scofield, Daniel Shurmer, and John Teagle for damages resulting from the negligent killing of her husband by said defendants. She averred in this complaint, among other things, that the decedent left surviving him this appellant, his widow; a daughter, Ruth Jannette Myers, aged ten years; a daughter, Gail B. Myers, aged six years; and a son, Lew W. Myers, aged one year—and that this appellant and these three children were wholly dependent upon the deceased for support, care, and protection. No other children or kin were mentioned in the complaint.

The case stated in this complaint was prosecuted to final judgment, which was affirmed upon appeal to this court. Afterward, on the ninth day of January, 1902, this appellant, who had then intermarried with one Duzan, filed her final report in the Marion circuit court. This report shows in substance the recovery of the judgment in the action for negligence, its affirmance in the

appellate court of Indiana, and the subsequent payment thereof by the defendants. The amount paid, which included accumulated interest and costs, was four thousand four hundred and ninety-five dollars and thirty-three cents. It also showed the payment of appellant's attorneys, asked an allowance of one hundred dollars to appellant for her services and for a small sum advanced by her for witness fees, and prayed for an order directing that the remainder be distributed as follows: One-third to the appellant, who was the widow of Henry D. Myers, deceased, and the remaining two-thirds in equal shares to her three minor children, Ruth Jannette, Gail Beatrice, and Lew Whitcomb, who were dependent upon the deceased for support at the time of his death. The report also shows that the deceased left no property, and that nothing was received by this appellant except the sum above mentioned. On the thirty-first day of January, 1902, Harry D. Myers, Howard L. Myers, Grace M. Myers, and Bessie L. Myers, by attorneys, filed objections and exceptions to the report of this appellant. The paper styled objections and exceptions was a joint one by ²²⁹ the four persons last named. It states, in substance, that the four persons named are surviving children of Henry D. Myers, deceased, and entitled to share equally with his other children in the fund for distribution. It is also averred that this appellant having married again, and her children having a stepfather, neither this appellant nor her children are entitled to participate in the distribution at all. Harry D. Meyers, one of the four petitioners, in the same paper makes a special objection on the ground that he was a minor at the time the judgment for the father's death was taken, and therefore entitled to share equally with the other minor children of the deceased. Grace M. Myers, another of the objectors, in the same paper, also stated a separate objection applicable to her only. It was, in substance, that she had a physical infirmity whereby she was more in need of assistance from her father than any of her brothers or sisters, and that she should therefore share in the distribution of the fund. She does not claim to have been a minor either at the time of her father's death, or at the time of the judgment. The prayer of the petitioners is that if there is any widow within the meaning of the law, one-third of the fund on hand be distributed to her, and the remaining two-thirds in equal shares to all of the adult children and the guardians of such as are minors.

Later this appellant filed separate motions to strike from the files the objections and exceptions filed by way of answer to her

final report as the separate objections of Harry D. Myers, for the reason that they did not show any valid objections or exceptions on behalf of said Harry D. Myers. The appellant filed a similar motion, addressed to the separate objections and exceptions of Grace M. Myers. The appellant also filed a general motion addressed to the exceptions and objections of the four objectors. Each of these motions was overruled and exceptions reserved. The appellant then filed a separate demurrer to the objections and answer in behalf of Harry D. Myers, for the reason that it did ²³⁰ not state facts sufficient to constitute a cause of defense in his behalf. She also filed a like separate demurrer addressed to the objections and answer of Grace M. Myers, and then a demurrer to the answer of objections of the four objectors, taken as a whole, for a like reason. These demurrers were overruled and exception reserved.

The appellant then replied to the objections and answer of appellees addressed to her report. The first paragraph of the reply is a denial, and the second avers, in substance, that Harry D. Myers was about eighteen years old at the time of decedent's death, and for about six years had been living with other persons, who had practically adopted him as their son, and had been completely emancipated by his father, the decedent, and allowed the benefit of his own earnings, and had received no pecuniary aid or support whatever from his father for about six years prior to his death. The reply avers that the other objectors were adults at the time of the father's death, and were receiving no support or aid from him whatever. The prayer of the reply was that the fund be distributed as prayed in the final report.

There was a trial upon the issues joined, and a judgment or decree entered admitting this appellant, her three minor children, and Harry D. Myers and Grace M. Myers—two of the objectors—to share in the distribution; the appellant to take one-third of the remaining fund, and the five children to share the other two-thirds equally. The decree recites that the court finds that these persons are the only ones who suffered any pecuniary loss from the death of the decedent. This appellant filed her motion for a new trial, assigning as error the admission of Harry D. Myers, and Grace M. Myers to the distribution of said fund. This motion for a new trial was overruled.

The errors assigned and relied on here are the overruling of this appellant's motion for a new trial, and rendering a judgment admitting Grace M. Myers and Harry D. Myers ²³¹ share in the distribution of the funds in the hands of appellant.

An action for damages for death occasioned by negligence depends wholly upon statute. In some form this right has existed in this state since 1852: 2 Rev. Stats. 1852, p. 205, sec. 784; 2 G. & H., p. 330, sec. 784; 2 Rev. Stats. 1876, p. 309, sec. 784; Acts 1881, p. 241; Acts 1899, p. 405; Burns' Rev. Stats. 1901, sec. 285; Horner's Rev. Stats. 1901, sec. 284. Under these statutes it has been held, whenever the question has arisen, that there could be no recovery except for pecuniary loss; and if there are no survivors who can be shown to have sustained such loss there is no right of action: *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Louisville etc. R. R. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *State v. Walford*, 11 Ind. App. 392, 39 N. E. 162; *Diebold v. Sharp*, 19 Ind. App. 474, 49 N. E. 837; *Wabash R. R. Co. v. Cregan*, 23 Ind. App. 1, 54 N. E. 767.

The amount recovered in such an action is a trust fund in the hands of the administrator for the benefit of those who, under the statute, are beneficiaries, and constitutes no part of the general estate of decedent for the benefit of creditors or heirs generally: *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Ind. 48; *Stewart v. Terre Haute etc. R. R. Co.*, 103 Ind. 44, 2 N. E. 208; *Wabash R. R. Co. v. Cregan*, 23 Ind. App. 1, 54 N. E. 767; *Hilliker v. Citizens' St. R. R. Co.*, 152 Ind. 86, 52 N. E. 607; *Pittsburgh etc. R. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419.

Distribution of the funds received must be made in the same manner as personal property of decedent is distributed: *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Ind. 48; *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151; *Haggerty v. Central R. Co.*, 31 N. J. L. 349; *Coleman v. Hyer*, 113 Ga. 420, 38 S. E. 962; *Citizens' St. R. R. Co. v. Cooper*, 22 Ind. App. 459, 72 Am. St. Rep. 319, 53 N. E. 1092; *Thornburg v. American Strawboard Co.*, 141 Ind. 443, 50 Am. St. Rep. 334, 40 N. E. 1062; *Drake v. Gilmore*, 52 N. Y. 389.

²³² The action from which the fund in question was derived was prosecuted for the benefit of the widow (administratrix) and her three minor children. They alone were mentioned in the complaint. From this it is argued that the damages were necessarily confined to the pecuniary loss sustained by the persons mentioned, and were awarded for their benefit. The action was brought by the administratrix, who was the widow of the decedent. The omission of the names of the children by the former marriage of the decedent was not unintentional, and

such omission of itself ought not to deprive them of the right to share in the fund recovered. The injury to the widow and the children of the decedent forms the basis of damages. Had the children of the first marriage asked, in the action for damages, that their names be set out in the complaint as beneficiaries, the court would have granted the request. The same question is here presented that would have arisen had their names appeared in said complaint.

Did the trial court err in admitting said Harry D. Myers, a minor nineteen years of age, to share in the distribution of the fund? The statute under which the judgment was obtained reads as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he or she (as the case may be) lived, against the latter for an injury for the same act or omission. The action shall be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any, or next kin, to be distributed in the same manner as personal property of the deceased": Burns' Rev. Stats. 1901, sec. 285. The amount recovered must "inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any," etc.

²³³ A parent is under a legal and moral obligation to support his children during their minority: *Louisville etc. Ry. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *Porter v. Powell*, 79 Iowa, 151, 18 Am. St. Rep. 353, 44 N. E. 295; *Sutherland on Damages*, 2d ed., sec. 1267.

The law will imply substantial pecuniary loss in some amount to the wife and children by the death of the husband and father, who was at the time employed, and presumably earning money: *Louisville etc. R. R. Co. v. Buck*, 116 Ind. 566, 9 Am. St. Rep. 883, 19 N. E. 453, and cases cited; *Sutherland on Damages*, sec. 1267.

The loss of the care, training and education which a father can give his children may justly be regarded as a pecuniary loss: *Board etc. v. Legg*, 93 Ind. 523, 47 Am. Rep. 390.

The decedent was, at the time of his death, sixty-four years of age, and was earning sixty-five dollars a month. Some years before decedent's death there was a period when he was out of employment, and his children by the former marriage left home. Said Harry at the time of his father's death was, and for eleven

years had been, living with one Mrs. Thomas, who furnished him with board and clothes, and sent him to school, and had the benefit of such labor as he performed. His father contributed nothing to his support, and did not receive any of his wages. It is contended, upon these facts, that Harry had been emancipated, and that he is therefore to be regarded as an adult, so far as the father's obligation to support him is concerned; and so far as the father's right to wages is concerned, that, in short, he had no pecuniary interest in his father's life, and was not entitled to participate in the fund in controversy.

By emancipation a father frees his son from service. Emancipation need not be evidenced by formal writing. It may be implied by the conduct of the father, and under such circumstances the child may sue and recover under contracts ²³⁴ made with him for his services. Possibly, Harry might in his own name have recovered the value of his services so rendered. But when a father frees his son from service "he does not waive the right to care, custody, and control, so far as the same can be exercised consistently with the right waived." "If the waiver has been for an indefinite period, the parent may assert his right to the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services": *Porter v. Powell*, 79 Iowa, 151, 18 Am. St. Rep. 353, 44 N. W. 295. Such question does not arise here.

The obligation of the parent to exercise care and properly to educate and train the child is a duty, not to the child alone, but to the public. His duty terminates only with the life of the minor, and if the child dies during minority the father is bound for decedent's funeral expenses: *Rowe v. Raper*, 23 Ind. App. 27, 77 Am. St. Rep. 411, 54 N. E. 770, and cases cited. It is matter of common observation that minor children are often emancipated from service for a definite or indefinite time without any intention of the parents of thereby releasing their right to exercise care, custody and control over them. The pecuniary interest of appellee Harry in the life of his father did not cease when the father was released from the tax of his support, presumably because of his poverty, being without employment, and the added burden of a young family—the family of his second marriage. The court did not err in admitting him to share the fund.

Grace M. Myers was twenty-eight years of age when her father died. She had suffered from childhood from curvature

of the spine. She had been living with a Mrs. Bartholomew for six years, doing light housework for her support. At irregular intervals her father gave her, at her request, money, in sums of one dollar and two dollars at a time. The evidence does not show that the sums thus given exceeded five dollars a year. She testified that her father gave her money when she "asked for it if he could possibly." Upon these facts appellant claims ²³⁵ Grace M. Myers was not entitled to share in this fund. The fact that children are of adult age at the time of the father's death does not preclude them from recovering for the loss of such pecuniary benefit as they had a reasonable expectation of securing from additional accumulations had he not been killed: *Tuteur v. Chicago etc. R. R. Co.*, 77 Wis. 505, 46 N. W. 897; *Mansfield Coal etc. Co. v. McEnery*, 91 Pa. St. 185.

The word "pecuniary," when it occurs in statutes, is not used in a sense of the immediate loss of money or property. It looks to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded. It is used in distinction to injuries to the sentiments which arise from the death of relatives, and excludes those losses which result from the deprivation of the society and companionship of relatives. "Claims on behalf of adult children who were not living with their parents are not excluded, though such claims are not legal; the 'injury' referred to is not restricted to the deprivation of a legal right": *Sutherland on Damages*, 2d ed., sec. 1270; *Railroad Co. v. Barron*, 5 Wall. 90.

The damages in these cases "must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. If the suit is brought by the party there can be no fixed measure of compensation for the pain and anguish of body or mind, nor for the loss of time and care in business, or the permanent injury to health and body. So when the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. . . . There is a difficulty in either case in getting at the pecuniary loss with precision and accuracy, more difficulty in the latter than in the former, but differing only in degree, and in both cases the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury": *Railroad Co. v. Barron*, 5 Wall. 90.

²³⁶ While appellee Grace received only small aid money from her father, these gifts evidenced his goodwill, and the court

might reasonably have concluded that the misfortune of her physical infirmity would have insured for her the continuance of such aid as he could give. Appellee had not an established home of her own. She had been given shelter by a stranger when conditions, for which she was not to blame, made her stay at her father's unpleasant. She was entitled to share in the distribution.

This is not an action to recover, but to distribute the fund already received. It is, in the language of the statute, "to be distributed in the same manner as personal property of the decedent"—that is, such distributions as must be made according to the law of descent which governs the distribution of personal property. But this must necessarily mean that such distribution is to be made among those for whose benefit the right of action is given: *Lewis v. Hunlock's Creek etc. Co.*, 203 Pa. St. 511, 93 Am. St. Rep. 774, 53 Atl. 349.

The other children of the former marriage, namely: Bessie and Howard, aged, respectively, twenty-five years and twenty-three years when their father died, have assigned as cross-error that the circuit court erred in rendering judgment which excluded them from a participation in the fund, to which they excepted. These children had not lived in their father's family for years, had been employed elsewhere, and their father had contributed nothing to their support.

The cases in this state holding that only beneficiaries who can show a pecuniary loss are entitled to recover, are not cases in which a wife or child was the claimant. Whether the statute should receive the liberal and broad interpretation giving to every child a part of the fund recovered, we need not determine, because the point is well taken by appellant that the assignment of cross-error does not present any question.

237 No motion was made to modify the judgment, nor was any particular defect therein pointed out. The mere exception to the judgment avails nothing upon appeal: *Elliott's Appellate Procedure and Trial Practice*, secs. 345, 796; *Cockrum v. West*, 122 Ind. 372, 377, 23 N. E. 140; *Mansfield v. Shipp*, 128 Ind. 55, 58, 27 N. E. 427; *Wood v. State*, 130 Ind. 364, 366, 30 N. E. 309; *Chicago etc. R. R. Co. v. Eggers*, 147 Ind. 299, 45 N. E. 786; *Jarrell v. Brubaker*, 150 Ind. 260, 49 N. E. 1050; *Hawks v. Mayor*, 144 Ind. 343, 43 N. E. 304.

Upon other grounds it is claimed that no valid exception was taken. This we need not consider.

Judgment affirmed.

The Authorities are not harmonious on the question whether adult or emancipated children are entitled to recover for the wrongful death of their parents: See the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 674, 680; *Lewis v. Hunlock's etc. Turnpike Co.*, 203 Pa. St. 511, 93 Am. St. Rep. 774, 53 Atl. 349; *Stahler v. Philadelphia etc. Ry. Co.*, 199 Pa. St. 383, 85 Am. St. Rep. 791, 49 Atl. 273. Probably this can be largely accounted for by reason of the varying terms of the different statutes.

COFFINBERRY v. MADDEN.

[30 Ind. App. 360, 66 N. E. 64.]

WEARING APPAREL—Jewelry.—Neither a watch, a watch-chain, a finger ring, nor a diamond shirt stud are articles of wearing apparel, within the meaning of a statute providing for the distribution of the wearing apparel of a decedent. (p. 354.)

D. Fraser, W. H. Isham, J. E. Rose and J. H. Rose, for the appellant.

W. Rhoads, P. V. Hoffman and D. M. Link, for the appellee.

360 BLACK, P. J. The appellee, administrator de bonis non of the estate of Herman N. Coffinberry, deceased, brought his action in replevin against the appellant William H. Coffinberry, who questions here the correctness of the court's conclusions of law upon the facts specially found, in substance as follows: In the year 1897, the appellee's intestate died in De Kalb county, leaving surviving him his widow and his two minor sons, one of them the appellant. At the time of his death the intestate had been living with his wife and children in the family relation. Immediately after his death, one John Yarde was appointed administrator of his estate, and he continued to act as such until the death of said Yarde, whereupon the appellee was appointed as administrator de bonis non. The estate of the intestate is insolvent. For some years prior to 1886, the intestate resided **361** in the town of Butler, in said county, where he was employed as trainmaster for the Wabash Railroad Company, receiving for his services in such employment one hundred and fifty dollars per month. In that year he removed to the city of Garrett, in that county, and there he entered the employ of the Baltimore and Ohio Railroad Company, as trainmaster, receiving for his services one hundred and ninety dollars per month. He continued in this employment until his election

as auditor of that county in November, 1890, when he removed to Auburn, and entered upon the discharge of the duties of that office, which he held until November, 1894, when he removed to the city of Garrett, and there established a private bank. In 1886, when he was about to remove from Butler to Garrett, the employés of the Wabash Railroad Company presented him with a gold watch and chain, described in the complaint, as a gift from them to him. At the time of his death the watch was worth seventy-five dollars, and the chain was worth fifteen dollars. At the time of his removal from Butler certain business men presented to him a ring set with small diamonds, which thereafter he caused to be reset in the watch-charm described in the complaint, which at the time of his death was worth thirty-five dollars, the diamonds constituting the greater part of the value. Prior to 1890 he purchased the ring described in the complaint—a gold finger ring—which, at the time of his death, was worth sixty-five dollars. Prior to 1890 he purchased with his own means the diamond shirt stud described in the complaint, which at the time of his death was worth from three hundred dollars to three hundred and fifty dollars, “and is now worth five hundred dollars.” It was a gold coil stud, containing a large solitaire diamond. From the time of the purchase thereof until his death he wore the diamond constantly, during which time he wore open-front shirts, and used the diamond stud for the purpose of fastening his shirt together; and it was on his person and was so used to fasten his shirt at the time of his death. From the time the watch and chain were given him, in 1886, he wore the same constantly; from the time he procured the watch charm ³⁶² until his death, he wore it constantly, attached to the chain; from the time he purchased the ring until his death, he wore it constantly; and the watch and chain, the watch-charm, and the ring were on his person at the time of his death. From the time he procured these articles until his death, he had no considerable property at any time exceeding the amount allowed him by law as exempt from execution. After his death, with the knowledge and consent of Yarde, administrator, Elizabeth K. Coffinberry, the widow of the intestate, assuming that she had authority under the statutes of this state to distribute said jewelry to the relatives of the intestate, on the ground of its having been wearing apparel of the intestate, did distribute all of the articles above described to the appellant, son of the intestate and said Elizabeth. Prior to the time the intestate became auditor, in 1890, he had no debts,

and the debts which rendered his estate insolvent were contracted by him afterward. It was also found that since the property was so distributed to him by his mother as aforesaid, the appellant "has and still does retain the same, and has and still does claim title thereto."

The court stated as conclusions of law upon these facts, that at the beginning of this action the appellee was entitled to the possession of the diamond stud, the gold ring with diamond setting, the gold watch and chain and the watch-charm, described in the complaint, a separate conclusion being stated as to each article; also that all the property described in the complaint was at the commencement of the action unlawfully detained by the appellant.

In our statute concerning decedents' estates is the following: "Where a man having a family shall die, leaving a widow or minor child, the following articles shall be omitted in making the inventory, and shall not be considered as assets, viz.: 1. All articles of apparel and ornament of the widow and of the children of the deceased. 2. The wearing apparel of the deceased; which shall be distributed ³⁶³ at the discretion of the widow, or, if there be no widow, in the discretion of the executor or administrator, among the nearest relatives, unless otherwise legally directed to be disposed of by the deceased. 3. Bibles and school-books used in the family of such deceased. 4. All the provisions on hand, provided for consumption by the family": Burns' Rev. Stats. 1901, sec. 2417.

It is apparent from the special finding that the appellant's possession was derived from supposed conformity to this statute; and our decision, having due reference to the theory of the case in the trial court, must involve a construction of that statute, as did the decision of the trial court. The widow did not assume to take possession of the articles in question as her own property, to which she was entitled as widow, and the finding does not show title or right of possession, or any claim therefor in any person other than the appellant or the appellee. The appellant holds the articles distributed by the widow to him as a nearest relative, upon the assumption that they were part of the "wearing apparel of the deceased," within the meaning and intent of the statute above quoted, and we are required to decide whether or not they constituted such "wearing apparel." This is not a technical phrase "having a peculiar and appropriate meaning in law," and it is to be taken in its "plain or ordinary and usual sense": Burns' Rev. Stats. 1901, sec. 240.

The word "apparel" and the phrases "wearing apparel" and "necessary wearing apparel" occur in statutes having various general purposes, as statutes relating to exemption from seizure on execution, and statutes concerning duties on imports, and they have been variously interpreted by the courts. We are not here influenced in our decision by any consideration as to whether or not any of the articles was necessary or more or less useful to the deceased, or as to whether or not it was intrinsically of great or little value, except as its expensiveness, considered in connection with its use, makes the chief characteristic that of an ornament. ³⁶⁴ We may properly derive some aid from the context, by observing that in the first clause of the statute "all the articles of apparel and ornament" of the widow and children are exempted, while in the second clause merely the "wearing apparel" of the deceased is exempted. Though an article may unquestionably be a part of the wearing apparel of a man or a woman which may be regarded as ornamental, or as serving some use in addition to that of ordinary vesture or clothing, yet if the chief and distinguishing characteristic of an article be to serve as an ornament, or to serve as a mechanism, any other purpose than that of clothing or part of the clothing for the body or some portion of the body, it can hardly be regarded as coming within the meaning of "wearing apparel," in the plain or ordinary and usual sense. No question has been presented in this case as to the right to seize, on a writ of replevin, articles actually worn on the person of the defendant at the time of the service of the writ.

In *re Jones*, 97 Fed. 773, was a case in bankruptcy. The court, professedly following the most liberal interpretation of the exemption statute of Wisconsin, held that a gold watch and chain carried on the person in the mode of ordinary usage was within the meaning of the phrase "all wearing apparel," and was therefore exempt: See, also, *Stewart v. McClung*, 12 Or. 431, 53 Am. Rep. 374, 8 Pac. 447; *Beckett v. Wishon*, 5 Ohio N. P. 155; In *re Steel*, 2 Flip. 324, 22 Fed. Cas. 1202 (No. 13,346); *Sellers v. Bell*, 36 C. C. A. 502, 94 Fed. 801.

In *Richardson v. Buswell*, 10 Met. (Mass.) 506, 43 Am. Dec. 450, it was held that cloth and trimmings left at a tailor-shop by a debtor, to be made into a coat necessary for him, were within a clause of a statute exempting from execution "the necessary wearing apparel of the debtor": See *Peverly v. Sayles*, 10 N. H. 356.

In *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666, the question being as to whether certain things were ³⁶⁵ sub-

ject to execution, all wearing apparel being so exempt by the law of the state, it was held that a valuable lace shawl was wearing apparel, but that rings and jewelry were not wearing apparel: See, also, *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726; *Maillard v. Lawrence*, 16 How. (U. S.) 251.

In *re Graham*, 2 Biss. 449, Fed. Cas. No. 5660, was a petition by a bankrupt for an order directing the assignee to add certain articles to the list of exempted property. It was held that a watch, not being exempt by the law of the state (Wisconsin), did not properly come within the discretionary articles contemplated by the bankruptcy act.

In *Rothschild v. Boelter*, 18 Minn. 361, a watch and chain were held not exempt from execution under the statute as "wearing apparel of the debtor and his family." It was said: "But that an article may be worn does not make it wearing apparel within this statute. The words are to be construed, in this case, according to the common and approved usage of the language (Gen. Stats. c. 4, sec. 1); namely, as referring to garments or clothing generally designed for wear of the debtor and his family."

In *Smith v. Rogers*, 16 Ga. 479, it was said that among the articles exempted from execution by statute, watches were not found, unless they came under the head of "wearing apparel." "It is doubtful whether they can be made to come under that head. If, however, they can, we think that not more than one can be made to do so. And one, and the best one," claimed by his wife, "the court allowed to be exempt in this case."

In *Gooch v. Gooch*, 33 Me. 535, it was said that a watch which a testator had been in the habit of carrying upon his person did not pass by a bequest of his wearing apparel. The court said: "The ordinary meaning of wearing apparel is vesture, garments, dress; that which is worn by or appropriated to the person."

In *Sawyer v. Sawyer*, 28 Vt. 249, under a statute by 366 which it was enacted that upon the death of the husband the widow should be allowed all her articles of apparel and ornament, and the wearing apparel of her husband, the court, per Bennett, J., said: "I should think it was the intention of the legislature to include in the terms, 'all the articles of apparel and ornament of the wife,' most, if not all the things which, at the common law, go to make up her paraphernalia, which, it is well understood, is of two kinds, clothing, bedding, etc., suitable to her condition in life, and secondly, her ornaments. But when, in contrast to this language, they simply give her the

wearing apparel of her husband, I think the legislature intended the term should be used in a more restricted sense, and be confined to its popular meaning, and include only such articles as may be properly termed the clothing of the husband, in contradistinction to ornaments." The court sustained the county court in its holding that the watch, watch-key, watch-chain, and seals, and the finger ring, and the sword and sword-belt were not to be deemed parts of the wearing apparel of the deceased husband, but that his epaulets and bosom pin were to be so considered. It was said: "Though a watch may have a further use than mere ornament, yet that is not enough to make it and its incidents wearing apparel. The finger ring is peculiarly matter of ornament, and we are disposed to consider the sword and sword-belt but emblems of distinction worn on special occasions, and which were in no way attached to the wearing apparel, so as to become a part of it. . . . The epaulets were attached to the coat, which must be regarded as wearing apparel, and may well follow their principal. So with the bosom pin; it is attached to the shirt, and serves to keep it in place, and there is no showing in the case that the pin was of an extravagant value, whatever effect such a showing should be permitted to have." Redfield, C. J., dissenting, regarded all the articles as exempt, except the watch, as to which he was in some doubt, but thought that ³⁶⁷ the practical construction of similar statutes had been to regard a lady's watch as part of her apparel and ornaments, and thus to belong to her, but that the husband's watch was part of the estate, and did not go to the widow.

Although all the articles here in question were adapted to be worn on the person, we are of the opinion that none of them should be regarded as wearing apparel, within the meaning of the statute involved in the case. So far as the watch could be said to have been useful as well as ornamental, its use was not of such a character as to distinguish it as a part of the apparel. The watch-chain was an appendage belonging with the watch. The shirt stud did serve a useful purpose in connection with the clothing, when the shirt worn was of a particular kind, but its expensive diamond made it chiefly and distinctively an ornament. The ring and charm were beyond question articles of ornament.

Judgment affirmed.

Articles of Jewelry, designed to be worn upon the person as ornaments, are not wearing apparel within the meaning of exemption laws: *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726. Rings are

within this rule: *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666; but a watch is not: *Stewart v. McClung*, 12 Or. 431, 53 Am. Rep. 374, 8 Pac. 447; *Brown v. Edmonds*, 8 S. Dak. 271, 59 Am. St. Rep. 762, 66 N. W. 310. See, also, *Mack v. Parks*, 8 Gray, 517, 69 Am. Dec. 267.

CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY v. WORTHINGTON.

[30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478.]

RAILROADS—Negligence—Proximate Cause.—If employes in charge of a railroad train negligently and wrongfully call a station at night, open the car doors, and stop the train at a point distant from the station, and a passenger, believing that the train has reached his destination at the station called, in attempting to alight, is suddenly jerked by the train and thrown violently to the ground, causing severe and permanent injury; the negligent calling of the station and the other events are but one transaction, and such negligence, and not the jerking of the train, is the proximate cause of the injury. (p. 357.)

RAILROADS—Negligence—Presumption.—Stopping a train at an unusual place causing an injury to a passenger places the railroad company presumptively in the wrong, throwing the onus of explanation upon the company. (p. 357.)

EVIDENCE—Judicial Notice.—Courts will take judicial notice that 3:20 A. M., in October, is not daylight. (p. 358.)

DAMAGES—Excessive.—A verdict or judgment for damages will not be disturbed as excessive if there is nothing in the record to indicate that they are so outrageously large as to induce the belief that their award must have been actuated by prejudice, partiality, or corruption, or that they were induced by improper considerations, upon a misunderstanding or misapplication of the evidence. (p. 358.)

NEGLIGENCE—Pleading.—If the facts alleged are sufficient to show negligence, it is sufficiently pleaded, although the acts complained of are not specifically alleged to be negligent. (p. 361.)

NEGLIGENCE may be Proximate Cause of an injury of which it is not the sole or immediate cause. It is enough for it to be the efficient cause which set in motion the chain of circumstances leading up thereto. (p. 362.)

R. D. Marshall, B. L. Smith, C. Cambern and D. L. Smith, for the appellant.

G. W. Young and J. V. Young, for the appellee.

663 WILEY, J. Action by appellee against appellant to recover damages for injuries sustained while a passenger upon one of appellant's trains. Answer in denial, trial by jury,

⁶⁶⁴ and verdict for appellee. Over appellant's motion for a new trial, judgment was entered upon the verdict.

Overruling a demurrer to the complaint and overruling the motion for a new trial are assigned as errors.

The complaint avers that on the eleventh day of October, 1900, appellee purchased of appellant at Rushville, Indiana, a ticket from Rushville to Indianapolis and return; that on the return trip, on the morning of October 12th, at about 3 o'clock, while it was yet dark, appellant's servants and employes, in charge of and managing the train on which appellee was a passenger, carelessly and negligently called the city of Rushville station, stopped said train, and opened the door of the car in which appellee was riding, as an invitation for her and other passengers to alight, although said train was not within forty rods of said station; that when appellee attempted to alight from said train, supposing it was at the station, as had been called by appellant's servants, said train suddenly jerked and threw her off of the car to the ground below, dislocating her shoulder, and bruising and permanently disabling her. The complaint further avers that appellee's injuries were caused by the carelessness and negligence of appellant, and without any fault on her part.

The objection urged to the complaint is that the negligent acts charged against appellant were not the proximate cause of the injury, but that appellee's injury was directly chargeable to the sudden jerking of the train, after she had gone to the platform and was in the act of getting off. Because the complaint fails to aver that the train was negligently "jerked," counsel contend that no actionable negligence is charged. It is the duty of employes in charge of passenger trains to call stations, in order that passengers may be advised so that they may be ready to leave the train at their destination promptly and with all reasonable dispatch. Passengers have the right to rely upon such announcement, and this right is emphasized when it is dark and they cannot see for themselves. It may be conceded that if the calling ⁶⁶⁵ of the station, which it is averred was negligently done before it was reached, was not the proximate cause of appellee's injury, then the complaint is bad.

The complaint avers that it was dark, and, as above stated, she had a right to rely upon the announcement made, and it was her duty to make all reasonable preparation to alight. The moving cause of her leaving her seat and going to the platform of the car, in the discharge of her duty to leave the train with

all reasonable dispatch after she had reached her destination, as she supposed, was the fact that the station where she desired to alight, and to which her ticket entitled her to be carried, was the announcement of the station by the servant of appellant. The train came to a stop immediately following the announcement of the station. Appellee was thereby induced to go to the platform of the car, upon such invitation to alight, and was thus placed in a position of peril. If the station had not been so announced, it is reasonable to suppose that she would have remained in her seat in a place of safety, and in such a position the sudden jerking of the train would have been harmless to her. It must necessarily follow that her injury is directly traceable to the negligence of appellant's servant in calling the station before it was reached. The calling of the station, the stopping of the train, appellee's going to the platform, and the sudden jerking of the train, are so intimately connected that they must be considered as one transaction, and this leads to the conclusion that the proximate cause of the injury was the negligence charged.

In support of appellant's position that the sudden jerking of the train was the proximate cause of the injury, and, as it is not charged that such jerking was negligent, the complaint does not state a cause of action, we are cited in the case of *Kentucky etc. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338. Our examination of that case leads us to the conclusion that it does not support appellant's position and is not in conflict with our holding here.

666 The carrier of passengers is held to the exercise of a very high degree of care, and for a failure to use this care is responsible to a passenger who suffers an injury in a case where no fault of his contributes: *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228.

It is the rule that stopping a train at an unusual place places a railroad company presumptively in the wrong, and the onus of explaining it is thrown upon the company: *Memphis etc. R. R. Co. v. Whitfield*, 44 Miss. 466, and cases cited on page 484, 7 Am. Rep. 699.

We are now dealing with a question of pleading, and, as shown by the complaint, the place where the train was stopped and where appellee was thereby invited to alight, forty rods from her point of destination, was an unusual, and we might add an improper, place for the train to stop, so far as is shown by the

complaint. The demurrer to the complaint was properly overruled. All other questions in the record are presented under the motion for a new trial. Appellant's motion for a new trial rests upon three grounds: (1) and (2) that the verdict is not sustained by sufficient evidence and is contrary to law; and (3) that the damages are excessive.

The first two reasons for a new trial may be considered together. It is disclosed by the evidence that appellant's track crosses the track of another railroad at or near the point where Rushville was called by the brakeman, and where the door of the coach in which the appellee was riding was opened and propped open for passengers to pass through in leaving the train. As to whether the train came to a full stop or merely "slowed up" at this crossing, it is a question about which there is a sharp conflict. A number of witnesses testified that the train came to a full stop, while others testified that it only "slowed up." It is urged by counsel for appellant that if appellee attempted to leave the train when it was in motion, she was guilty of contributory ⁶⁶⁷ negligence and could not recover. Grant this to be the rule, yet the jury are warranted in reaching the conclusion that the train came to a full stop.

There is also a conflict in the evidence as to whether appellee was on the step or platform of the car when she was thrown off. There was ample evidence, if the jury believed it, to show that just as she reached the platform, and before she began to descend the steps, the train jerked and she was thrown from the platform to the ground. We cannot see what material difference it makes whether she was on the steps or platform. If she was on either at the invitation of appellant, and the train had stopped, and she was in the exercise of reasonable care, and was thrown off by the sudden jerking of the train, whether she was on the platform or steps would not lessen appellant's liability.

It is contended by counsel that appellee was guilty of negligence in attempting to get off the train at the crossing, on the theory that she lived at Rushville, was acquainted with the location at the depot, knew it was on the south side of the track, and knew that the Big Four and Lake Erie and Western tracks crossed appellant's tracks about forty rods west of appellant's depot. It is also claimed that it was not so dark but that she could have seen, if she had looked, that the train was not at the station, and that it was her duty to use her eyes. The evidence does show that appellee lived in Rushville. She testified that she had never been over appellant's road but twice, and did not

know of the location of the Big Four crossing, but heard there was such a crossing. There is no evidence contradicting her statements on these points. One witness, who was also a passenger, and was getting off the train immediately behind appellee, testified that a brakeman passed through the coach where they were riding, called "Rushville" twice, and propped the car door open; that appellee and she started for the door when the train stopped, and just as appellee got to the platform she was thrown off. Appellee was asked and ⁶⁶⁸ answered the following questions: "Tell the jury why you could not see the ground? A. Because I did not have time before I was knocked off. Was it light enough to have seen the ground? A. No. Was it cloudy? A. It was dark." The conductor in charge of the train testified that the train left Indianapolis at about 1:45 A. M., and reached Rushville about 3:20 A. M. The court will take judicial notice that at that time in the morning on the 12th of October it is not daylight. So appellee is corroborated in her statement that it was too dark to see.

From all the evidence we are unable to see in what particular instance appellee can be charged with contributory negligence. As to whether she was or not was a question for the jury, and by their general verdict that question was solved in her favor. There is ample evidence to sustain the verdict. This leaves the question of excessive damages to be considered. The evidence as to the extent of appellee's injuries is not without conflict, neither is it clear that her injuries are permanent, or only temporary. The evidence of a physician who attended her shows that she was very badly injured in many ways. One of her shoulders was dislocated, her face was bruised and blackened, one of her eyes was swollen shut, her nose was cut to the bone, her lip cut through, and she suffered great pain. At the time of the trial he could not say whether her shoulder was permanently injured or not. There is nothing in the record to indicate that the damages assessed are so outrageously large as to induce the belief that the jury must have been actuated by prejudice, partiality or corruption, or that they were influenced by improper considerations, or that they misunderstood or misapplied the evidence. This being true this court will not reverse a judgment on the ground that the damages assessed are excessive: Indianapolis St. R. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936; Evansville etc. R. R. Co. *v.* Weikle, 6 Ind. App. 340, 33 N. E. 639; ⁶⁶⁹ Cleveland etc. Ry. Co. *v.* Kinsley, 27 Ind. App. 135, 60 N. E. 169, and cases there cited.

We do not find any reversible error. Judgment affirmed.

Roby, C. J., Robinson and Black, JJ., concurring.

Henley, J., not participating.

Comstock, J., absent.

CONCURRING OPINION.

ROBY, C. J. An intervening agent, in order to break the chain of events between appellant's alleged negligence and appellee's alleged injury, must have been independent. It does not appear that any independent agent intervened in any way. The act which appellant now claims caused the injury was its own act. Exemption from responsibility cannot thus be secured: *Kraupt v. Frankford etc. Ry. Co.*, 160 Pa. St. 327-335, 28 Atl. 783.

ON PETITION FOR REHEARING.

ROBY, C. J. The argument presented in support of the petition for a rehearing is confined to the question of proximate cause as it arises upon the averments of the complaint. That pleading is, in part, as follows: "That on the return trip on said ticket, at about the hour of 3 oclock A. M., on the morning of October 12, 1900, while it was yet dark, said defendant's (corporation's) servants and employés, in charge of and managing and operating and controlling a locomotive and train of cars then and there being operated and run over and upon said railroad on which said plaintiff was a passenger, carelessly and negligently called the city of Rushville station, and stopped the said train, and opened the door of said car in which plaintiff was riding, as an invitation for her and others to alight from said train, although said train was not within forty rods of said station. And when said plaintiff attempted to alight from said train, supposing it was the station, as had been called by defendant's ⁶⁷⁰ servants, said train suddenly jerked and threw said plaintiff off of said car to the hard ground below, thereby dislocating her shoulder, and bruising and permanently disabling her; that said injury was not caused by the negligence of plaintiff, but was caused by the negligence of defendant's servants and employés, to her damage," etc. The sudden jerking of the train is not, in terms, designated as negligent. "The question of negligence or no negligence is to be determined from the facts pleaded, and the presence or absence of general epithets adds no

real force to the facts stated. If the facts stated are sufficient to show negligence, the absence of epithets does not impair their force; if they are not sufficient, no more epithets can supply the want": *Weis v. City of Madison*, 75 Ind. 241, 246, 39 Am. Rep. 135; *Island Coal Co. v. Clemmitt*, 19 Ind. App. 21, 49 N. E. 38; *Blue v. Briggs*, 12 Ind. App. 105, 106, 39 N. E. 885; *Louisville etc. R. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197. Having caused its passenger to go upon the platform in the night-time for the purpose of getting off its train at a station, no epithets are required to show that the jerking of the train, while she was in the act of alighting, with the degree of force specified, was necessarily a breach of the duty owing to her. It follows that speculation as to which particular specified act done or omitted by appellant was the proximate cause of the injury is without practical interest.

If we continue to grant appellant's assumption that the invitation to alight must appear to be the proximate cause of the injury complained of, still the complaint is, under well-settled and often declared principles, sufficient. The negligent calling of the station, opening the door, and stopping the train, concurring with other conditions created by appellant, caused the injury. "Two or more conditions that may each be harmless, or even beneficial, when taken separately, may yet be exceedingly hurtful, and even dangerous, when taken together. It is the combination of ingredients that makes the deadly poison, although the separate ⁶⁷¹ elements may be quite innocent": *Lake Shore etc. R. Co. v. McIntosh*, 140 Ind. 261, 274, 38 N. E. 476.

Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. It is enough for it to be the efficient cause which set in motion the chain of circumstances leading up thereto: *Lake Shore etc. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Alexandria Min. etc. Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680; *Louisville etc. R. Co. v. Nolan*, 135 Ind. 60, 65, 34 N. E. 710; *White Sewing-Machine Co. v. Richter*, 2 Ind. App. 331, 28 N. E. 446; *Board etc. v. Sisson*, 2 Ind. App. 311, 317, 28 N. E. 374; *Grimes v. Louisville etc. R. Co.*, 3 Ind. App. 573, 30 N. E. 200. "Where an injury is the combined result of the negligence of the defendant, and an accident for which neither the plaintiff nor the defendant is responsible, the defendant must pay damages, unless the injury would have happened if he had not been negligent": *Reid v. Evansville etc. R. Co.*, 10 Ind. App. 385, 391, 53 Am. St. Rep. 391, 35 N. E. 703; *Board etc. v. Sisson*, 2 Ind. App. 311, 28 N. E. 374; *City*

of *Mt. Vernon v. Hoehn*, 22 Ind. App. 282, 53 N. E. 654; *Knouff v. City of Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292, 59 N. E. 347. Had appellee remained in the car, she would not have been injured. That she did not do so is alleged to have been due to the negligence of the appellant. It thereby put into operation the chain of events which, without intervening agencies, resulted in the injury complained of.

The petition is overruled.

The Liability of a Railroad Company to a passenger injured in alighting from a train, where an employé calls out the name of a station, but the train runs by or stops short of it and in starting up throws the passenger to the ground, is considered in the monographic note to *Hemmingway v. Chicago etc. Ry. Co.*, 7 Am. St. Rep. 832-834.

The Doctrine of Proximate Cause is the subject of a monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861. The proximate cause is the efficient cause—the one that necessarily sets the other causes in motion. It need not be the sole cause: *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 Am. St. Rep. 251, 33 N. E. 795; *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17, 19 S. W. 284; *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441, 42 Atl. 60; *Upton v. Town of Windham*, 75 Conn. 288, ante, p. 197, 53 Atl. 660.

CASES
IN THE
SUPREME COURT
OF
IOWA.

NOYES v. CRAWFORD.

[118 Iowa, 15, 91 N. W. 799.]

SPECIFIC PERFORMANCE—Conveyance Pendente Lite.—During the pendency of a suit for specific performance neither party to the action can alienate the property in dispute so as to affect the rights of his opponent. (p. 366.)

CONVEYANCES.—Unrecorded Deeds are Valid as against all persons except purchasers and encumbrances for valuable consideration and without notice. (pp. 366, 367.)

LIS PENDENS is Notice to Those Only who attempt to acquire some interest in the subject matter of a litigation after suit is begun, and from a party thereto. (p. 367.)

SPECIFIC PERFORMANCE—Who Affected by Suit.—A suit for specific performance of a contract to convey land does not affect a prior bona fide purchaser under an unrecorded deed without notice of plaintiff's claim, who is not made a party to the suit. One who has a title which antedates the suit, but is not of record, and who is not made a party to the suit, is not bound by the lis pendens. (p. 368.)

F. F. Faville and T. D. Higgs, for the appellant.

Mack & De Land, for the appellees.

16 WEAVER, J. On February 19, 1900, the defendant W. H. Crawford was the owner of the half section of land in controversy, and on that date made a written contract to sell and convey the same to one Clemens. On the same day Clemens assigned the contract to plaintiff. Crawford was a married man, living upon the land, but his wife did not join in the contract. On February 22, 1900, Crawford having refused to convey, this action was instituted by filing petition for specific performance and by serving notice upon some of the defendants. On the twenty-first day of February, Crawford and wife conveyed the

land by deed to one Sisson, and on the same day Sisson and wife conveyed it to one Bartholow, who in turn, on the 17th of April, 1900, conveyed to Frank K. Robeson. The deeds from Crawford to Sisson, and from Sisson to Bartholow were filed for record March 6, 1900, and the deed from Bartholow to Robeson April 20, 1900. In the original petition W. H. Crawford was alone made defendant. On September 1, 1900, an amendment was filed to the petition, naming Sisson, Bartholow and Robeson as additional defendants, alleging that they took title to the land with notice of plaintiff's rights. No notice has ever been served upon Bartholow, and he does not appear. The wife of Crawford has never been made a party. The defendant Robeson denies the claim made by plaintiff, alleges that he obtained the title to the land in good faith, and without notice of any right in the plaintiff, and sets out the various conveyances through which the title has passed from Crawford to himself. He also alleges that Crawford's wife had an inchoate dower right as well as a homestead in the land; that she did not join in the contract to Clemens, and has never been made a party to the suit. By a separate answer Sisson alleges that he purchased and took conveyance of the land on the 21st of February, in good faith, and for a valuable consideration, and ¹⁷ thereafter, and before being made a party to the suit, sold and conveyed the same to Bartholow. Crawford also answers, setting up the same matters alleged in the answers of Robeson and Sisson, and further says, while admitting having made the contract sued upon, that the same was wholly without consideration. By way of reply, plaintiff states that, if the wife of Crawford has any interest in the land, or if they have any homestead rights therein, he is willing to take the title subject to such rights and encumbrances, with such reduction or reservation from the purchase price as shall be found equitable.

1. The evidence develops the fact that this is one of the controversies not infrequently arising out of rivalry existing between real estate agents. Crawford, it seems, had listed his land for sale with Sisson, and evidently, also, had some dealings of the same nature with Clemens. On February 20th, Sisson, learning of the contract with Clemens, called Crawford to his office, and told him that some days prior to the 19th of said month he had negotiated a sale of the land to Bartholow, and would expect him to make conveyance accordingly. In response to Crawford's statement that he had already contracted with Clemens, Sisson claimed to have the exclusive agency for the

sale of the land. and insisted that the sale to Bartholow be carried out. This interview was the inception of negotiations which culminated in the conveyance to Sisson on the following day, and the almost immediate conveyance by Sisson to Bartholow. The deed from Crawford to Sisson was undoubtedly passed before the beginning of the suit now before us, and the deeds from Sisson to Bartholow and from Bartholow to Robeson were also executed and delivered before either of these three persons was made a defendant. Were this litigation between plaintiff and Sisson alone, its solution would not be difficult, for undoubtedly the latter purchased with full knowledge of plaintiff's contract, and ¹⁸ he acquired no other or better right than Crawford himself had in the premises. But when Bartholow took the title his grantor was not a party to the suit, and held by a title antedating the commencement of such suit. The same is true of the conveyance to Robeson. We are thus brought to the inquiry whether Robeson was, as a matter of law, chargeable with notice of the pendency of this suit at the time he received the conveyance from Bartholow. While there may be room for suspicion that the several conveyances were all parts of a plan to defeat the sale to plaintiff, there is no evidence on which we can find such to be the fact, except as to the deed from Crawford to Sisson. It is also shown without contradiction that each conveyance was made for a valuable consideration. Our statute upon the subject of *lis pendens* reads as follows: "When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's rights, if the real property affected be situated in the county where the petition is filed": Code, sec. 3543. As interpreted by this court, this section "applies only in cases when, pending the action, a third person deals with reference to the subject matter with a party to the action": *Sprague v. White*, 73 Iowa, 674, 35 N. W. 751; *Parsons v. Hoyt*, 24 Iowa, 154; *Semple v. McCrary*, 46 Iowa, 37; *Baily v. McGregor*, 46 Iowa, 667; *Joseph v. McGill*, 52 Iowa, 127, 2 N. W. 1007. This is also the uniform holding in other states: *Green v. Rick*, 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760; *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *Parks v. Jackson*, 11 Wend. 442, 25 Am. Dec. 656; *Becker v. Howard*, 4 Hun, 361; *Gibler v. Trimble*, 14 Ohio, 323; *Clarkson v. Morgan*, 6 B. Mon. 441; *Fogarty v. Sparks*, 22 Cal. 142; *Irvin v. Smith*, 17 Ohio, 226; *Hunt v. Haven*, 52 N. H. 172; *French v. Loyal Co.*, 5

Leigh, 627. Mr. ¹⁹ Pomeroy states the rule very briefly and very clearly as follows: "During the pendency of a suit neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent": 2 Pomeroy's Equity Jurisprudence, sec. 633. "A person whose interest existed at the commencement of the suit is a necessary party, and will not be bound by the proceedings unless he be made a party to the suit": *Arnold v. Smith*, 80 Ind. 422; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Ensworth v. Lambert*, 4 Johns. Ch. 605. "*Lis pendens* has no application to a third person, whose interest existed before the suit was commenced, and who might have been an original party": *Bigelow on Frauds*, 301. See, also, *Wade on Notice*, 350, 369. Indeed, we think it would be hard to find any authority to sustain the contrary proposition. The cases cited by counsel for appellant from our own reports fall far short of holding that the grantee of the land is bound by a suit begun against his grantor after the conveyance under which he claims title. *Haverly v. Alcott*, 57 Iowa, 171, 10 N. W. 326, upon which much reliance seems to be placed, is not in point. In that case *Alcott* conveyed the land after suit had been begun against him, and, under the rule which we have stated, his grantee, and all claiming through such grantee, were bound by such adjudication, under the doctrine of *lis pendens*. The controversy there turned upon the question whether the failure of the clerk to properly index the case in the appearance docket relieved the purchaser from the effect of the *lis pendens*, and it was held that the filing of the petition constituted a sufficient compliance with the law, and the error in indexing the case was immaterial. In other words, the court there held, not that a person who purchases land is bound by a suit thereafter begun against his grantor, and to which he himself is not made a party, but that in the case then under consideration the suit was begun when the petition was filed, and therefore the intervenor's purchase, subsequently ²⁰ made, was *pendente lite*, and subject to the judgment rendered in such litigation. The words "*lis pendens*" ("*pending suit*") are self-explanatory, and until there be a suit pending there can be no such thing as a purchaser *pendente lite*. The only serious question in this connection is whether the fact that the deed from *Crawford* to *Sisson* was unrecorded at the date of the commencement of the suit has any effect to change or modify the application of the rule. An unrecorded deed is valid between the parties and as against all persons except purchasers and encumbrancers for valuable consideration

and without notice. One who commences a suit against the holder of a legal title does not occupy the position of a purchaser, within the meaning of the recording act. Neither is *lis pendens* the equivalent of registration under such act. Registration of an instrument admissible to record is notice thereof to the entire world, but *lis pendens*, as we have seen, is notice to those only who attempt to acquire some interest in the subject matter of a litigation after suit is begun, and from a party thereto. Indeed, many authorities hold that *lis pendens* is not primarily a rule of notice at all, but of public policy: *Murray v. Lylburn*, 2 Johns. Ch. 441; *Haughwout v. Murphy*, 22 N. J. Eq. 544; *Walden v. Bodley*, 9 How. (U. S.) 49; *Bellamy v. Sabine*, 1 De Gex & J. 566; *Lamont v. Cheshire*, 65 N. Y. 37; *Eyster v. Gaff*, 91 U. S. 521. In the *Bellamy* case, it is said that *lis pendens* affects the purchaser, "not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute. . . . The necessities of mankind require that the decision of the court shall be binding not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice of the pending proceedings." However, it is perhaps not very material whether we call the rule one of notice or of public ²¹ policy; the result is the same—the purchaser of the subject of litigation from a party litigant after suit is begun is bound by the result of the proceedings into which he thus intrudes. But Robeson, the present holder of the legal title to the land now in controversy, did not purchase from a party to the suit, nor were any of his grantors parties thereto at the date of the conveyances made by them. The mere fact that these deeds were not of record when the suit was begun does not, as we view it, affect the relative rights of the parties. The recording act is for the benefit of subsequent purchasers only (Code, sec. 2925), and the term "subsequent purchasers" is used to describe purchasers claiming under a common grantor: *Rankin v. Miller*, 43 Iowa, 11. It does not protect mechanics' liens or judgment liens against prior unrecorded deeds: *Fletcher v. Kelly*, 88 Iowa, 475, 55 N. W. 474; *Eldred v. Drake*, 43 Iowa, 569; *Munson v. Frazer*, 73 Iowa, 177, 34 N. W. 804.

It is true that the conflicting claims of title in this case are both traced to Crawford as a common grantor, but plaintiff does not claim to be a "subsequent purchaser." He claims to have been the prior purchaser, and, in default of the possession

of a deed which he could place of record, and thus prevent a subsequent valid sale by his grantor, he undertook, by instituting this action, to create a *lis pendens*, which would have the same effect. He delayed such action for three days, and meanwhile the title was diverted into the line under which Robeson claims. The suit, when begun, was against Crawford alone, and hence, as we have seen, did not operate to give notice to or bind the purchaser who had already taken title from Crawford, and the grantees of such purchaser took title without being affected by the statute of *lis pendens*. The plaintiff does not testify or attempt to show that he examined the records before beginning suit, or that he was in any manner misled by such records, and, indeed, does not make any claim ²² in testimony that he was ignorant of the conveyance by Crawford. That he does not seem to have thought the grantees of Crawford necessary parties is indicated by his failure to implead them until several months after their deeds were placed of record showing the Robeson title to have been derived from Crawford before the suit was begun. The authorities are not in harmony as to the effect of an unrecorded conveyance by the defendant in actions of this kind, but we think the rule as stated by Mr. Freeman has the strongest support: "If a suit is brought by A against B to quiet title to land, or to recover possession thereof after B has conveyed to C, the latter cannot be bound by the judgment when he is not a party to the action, because neither A nor any of his grantees can be regarded as purchasers under B or C, who are the parties to the unrecorded conveyance": 1 Freeman on Judgments, sec. 201. "Generally, the statute authorizing a registration of writings does not make them void while unregistered, but merely protects from their operation innocent purchasers from the parties thereto, or some of them. If a suit results in a sale of the property, so that some one becomes an innocent purchaser thereunder he is doubtless protected from an unrecorded writing of which he has no actual or constructive notice; but unless and until some one becomes such purchaser, one who has a title which antedates the suit, but is not of record, is not bound by the *lis pendens*": 1 Freeman on Judgments, sec. 201. This principle is recognized and followed by many cases among which we may cite in point: *Smith v. Williams*, 44 Mich. 240; *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537; *Irvin v. Smith*, 17 Ohio, 226; *Davenport v. Turpin*, 41 Cal. 100; *Hammond v. Paxton*, 58 Mich. 393, 25 N. W. 321. Most of the cases which seem to be inconsistent with the doctrine here fol-

lowed will be found upon examination to have been controlled by the terms of the local registration statutes: *Leonard v. Bay Co.*, 28 N. J. Eq. 192. It is true that in ²³ *Mitchell v. Peters*, 18 Iowa, 119, decided by this court in 1864, the writer of the opinion speaks of the rule here approved as something which "may well be questioned," but does not undertake to decide or discuss it, the decision there having been reached upon the undisputed testimony that defendant took the title asserted by him with express notice of plaintiff's rights. We therefore hold that, as defendant Crawford had divested himself of the title to the land before suit was begun against him, and as such title had passed by successive conveyances to the defendant Robeson, for valuable consideration, and without notice, before any of the said grantees were made parties to the litigation, the relief asked by plaintiff was properly denied by the district court. This conclusion renders it unnecessary to consider or decide other questions discussed by counsel.

The decree of the district court is affirmed.

The General Rule of Lis Pendens is stated in *Goff v. McLain*, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64, and cases cited in the cross-reference note thereto. The holder of an unrecorded conveyance made before the commencement of an action cannot be regarded as a purchaser pendente lite: *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166; *Baker v. Bartlett*, 18 Mont. 446, 56 Am. St. Rep. 594, 45 Pac. 1084. Compare *Smith v. Worster*, 59 Kan. 640, 68 Am. St. Rep. 385, 54 Pac. 676, and see the discussion of this question in the monographic note to *Stout v. Phillipi Mfg. etc. Co.*, 56 Am. St. Rep. 871, 872, on the law of *lis pendens*.

An Unrecorded Deed is valid, in most jurisdictions, between the parties thereto, and those with notice: *Doran v. Dazey*, 5 N. Dak. 167, 57 Am. St. Rep. 550, 64 N. W. 1023; *Lake v. Hancock*, 38 Fla. 53, 56 Am. St. Rep. 159, 20 S. E. 811.

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KREBS v. NICHOLSON.

[118 Iowa, 134, 91 N. W. 623.]

EXEMPTION.—Harness and Cart used by the owner of a stallion as a means of conveyance when he is employed therewith are exempt from execution, as the property of a laborer. (p. 370.)

Boardman, Aldrich & Lawrence, for the appellants.

Meeker & Meeker, for the appellee.

134 SHERWIN, J. The plaintiff's only occupation at the time of the levy was that of traveling from stand to stand with a stallion which he used for breeding purposes at these different places. The harness and cart were used as the means of conveyance of the plaintiff on these trips, and they were clearly exempt, under the rule announced in *Roberts v. Parker*, 117* Iowa, 389, 94 Am. St. Rep. 316, 90 N. W. 744. Whether the plaintiff was at the time such a laborer **135** as is contemplated by section 4008 of the Code, which provides exemptions for specified occupations and for "other laborers," presents a more difficult question. The evidence shows that the plaintiff personally took care of his horse, and attended him in his services of mares. That these duties, in connection with that of driving the stallion from place to place for the purpose specified, involved labor on the part of the plaintiff, we do not doubt; and the fact that the horse was used for stock purposes, instead of for drawing a loaded wagon or a plow under the direction of his owner, should not make such owner any the less a laborer than he would be if he had been employed with his horse in these occupations, or in transporting merchandise or passengers, and such work would surely place him within the statutory class: *Root v. Gay*, 64 Iowa, 399, 20 N. W. 489; *Tank Line Co. v. Hunt*, 83 Iowa, 6, 32 Am. St. Rep. 285, 48 N. W. 1057. A laborer is defined to be one who is "engaged in some toilsome physical occupation; one who performs work which requires little skill or special training": 4 Century Dictionary, 3318. While it cannot be said as a matter of law, that the plaintiff's occupation was of the most toilsome nature, it still required some physical effort, and but little skill or special training, as we understand it; and, if by this labor he earned his living, he was a laborer, within the meaning of the statute.

The judgment is affirmed.

Exemption Statutes receive a liberal construction: *Roberts v. Parker*, 117 Iowa, 389, 94 Am. St. Rep. 316, 90 N. W. 744. As to the exemption of horses and teams, see *Cleveland v. Andrews*, 5 Idaho, 65, 95 Am. St. Rep. 165, 46 Pac. 1025; *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990. A stallion is held not exempt when kept only for the service of mares: *Robert v. Adams*, 38 Cal. 583, 99 Am. Dec. 413. A set of harness does not fall within the words "common tools of trade": *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990. But see *Hutchinson v. Whitmore*, 90 Mich. 255, 30 Am. St. Rep. 431, 51 N. W. 451. A wagon may be exempt as a tool: *Johnson v. Lang*, 71 N. H. 251, 93 Am. St. Rep. 509, 51 Atl. 908. See, also, *White v. Gemeny*, 47 Kan. 741, 27 Am. St. Rep. 320, 28 Pac. 1011. The horse, harness, and wagon of one engaged in assaying, sampling, and working ores, have been held exempt: *Watson v. Lederer*, 11 Colo. 577, 7 Am. St. Rep. 263, 19 Pac. 602; so have the horse, harness, and buggy of an insurance agent: *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281, 21 Pac. 256. See further, on what articles are exempt, the monographic notes to *Kilburn v. Demming*, 21 Am. Dec. 545-554; *Baker v. Willis*, 25 Am. Rep. 63-67; *Richards v. Hubbard*, 47 Am. Rep. 190-192. As to who are laborers within the meaning of exemption statutes, see the monographic note to *Oliver v. Macon Hardware Co.*, 58 Am. St. Rep. 303-309; *State v. Land*, 108 La. An. 512, 92 Am. St. Rep. 392, 32 South. 433.

MARTIN v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

[118 Iowa, 148, 91 N. W. 1034.]

RAILROADS—Speed of Trains.—Habitual violation of a municipal ordinance regulating the speed of trains does not relieve a railroad company from the imputation of negligence. (p. 373.)

RAILROADS—Speed of Trains.—The Benefit of Ordinances regulating the speed of railroad trains may be claimed by anyone coming within their protection. (p. 373.)

MASTER AND SERVANT—Assumption of Risks.—An employé who, knowing and appreciating a danger, voluntarily assumes the risk, thereby exempts his master from liability for injury, although the employer is primarily responsible for the existence of such danger. (p. 377.)

MASTER AND SERVANT.—Assumption of Risks as between master and servant is the same, whether they arise from the violation of a common-law duty, or an obligation imposed by statute. (p. 378.)

MASTER AND SERVANT—Negligence—Assumption of Risk. If a railroad employé who has assumed the risks incident to the ordinary speed of a train sues for an injury alleged to have been caused by an excessive rate of speed, he must prove in order to recover, not only an excessive rate of speed constituting negligence, but also that it was the operating cause of the injury. (p. 380.)

E. M. Sharon and Ely & Bush, for the appellant.

Cook & Dodge, for the appellee.

149 LADD, C. J. The freight train, composed of thirteen loaded cars, twenty-six empties, and the caboose, was made up at Rock Island, from which place it departed at 5 o'clock in the morning. When it reached Perry street, in Davenport, a second engine or "helper" was attached, and together the two pulled the train west to Farnam, where the absence of the head brakeman was first discovered. Evidently he had fallen from the top of the train about fifteen or twenty feet west of Fillmore street, in Davenport. The circumstances warranting this inference are: 1. A dint in the snow between the tracks at that place, as though a person had fallen some distance on the hip; 2. His lantern just outside of the track; 3. Parts of his body and blood stains from that point to the place where the head and trunk were found. It may also be inferred that he fell between the third and fourth cars from the engine, for blood stains were found on the front trucks of the fourth car, and from there on back. The running-board of the third car was about a foot wide, while that on the fourth car was a foot higher, and consisted of three strips about an inch apart, and projecting over at the end five or six inches. The tops were frosty, but upon examination no indications that he had slipped were discovered. The wind was blowing from the northwest, the direction the train moved, at a velocity of five miles an hour. The temperature was eleven and one-half degrees above zero; the humidity of the atmosphere, ninety per cent. Fillmore street is one block west of the semaphore, two blocks west of Marquette street. Between these streets are five switches—one at the semaphore, connecting with defendant's branch line to the southwest, and the others were tracks to local industries. From Perry street to Fillmore the road was slightly undulating, but from Fillmore street to Farnam, a block less than two and seven-tenths miles away, the up-grade was forty-seven and one-half feet to the mile. Opinions as to the speed of the train **150** differ widely, but the jury might have found it anywhere between twelve and twenty-five or thirty miles per hour. All agree that it exceeded six miles an hour, the limit fixed by the ordinance of the city of Davenport. The defendant, then, was negligent in violating the ordinance, and the three grounds of the motion on which the jury were directed to return a verdict raise the questions: 1. Did such negligence occasion the injury to de-

ceased? 2. Did deceased, by any fault on his part, contribute to his injury? And 3. Had he assumed the risk of the high rate of speed at which the train was moving?

1. The ordinance of the city of Davenport prohibited trains from moving within the corporate limits at a speed exceeding six miles an hour. The evidence showed that it was customary on defendant's line for trains such as that in question to leave for the west at a much higher speed, in order to make the grade; and, as deceased had been engaged in work as brakeman something like seven months in all, he must have known of this practice. Of course, the mere fact that defendant habitually violated the ordinance does not relieve it from the imputation of negligence: *Hamilton v. Des Moines Valley Ry. Co.*, 36 Iowa, 31; *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 522, 18 Am. St. Rep. 381, 44 N. W. 800; *Weber v. City of Creston*, 75 Iowa, 16, 39 N. W. 126; *Connors v. Burlington etc. Ry. Co.*, 74 Iowa, 383, 37 N. W. 966. Nor can it be said that ordinances of this character have for their sole object the protection of those having occasion to go on or across the tracks. They are not thus limited in their terms. Their benefit may be claimed by any person coming within their protection: *Illinois Cent. R. R. Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724; *East St. Louis etc. Ry. Co. v. Eggmann*, 170 Ill. 538, 62 Am. St. Rep. 400, 48 N. E. 981; *Pittsburgh etc. R. R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290; *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103. Nevertheless the evident purpose in their ¹⁵¹ enactment is to guard against injury to those using the streets, rather than the employes of the railroad engaged in operating the trains.

In undertaking the work of brakeman with knowledge that the ordinance was ignored by the railroad company, or continuing at work without complaint after ascertaining the fact, did deceased assume the risk of the danger incident to its violation? The authorities are in sharp conflict on this proposition. Those holding that such a risk is never assumed go on the theory that, as the assumption of risk is based on an implied contract, it would be opposed to sound public policy to permit one to agree in advance to a violation of a statute or city ordinance. In *Narramore v. Cleveland etc. Ry. Co.*, 37 C. C. A. 499, 96 Fed. 298, the statute enjoined on the railroad companies the duty of blocking switches, and Judge Taft, after reviewing the decisions, concluded that: "Assumption of risk" is a term of the contract of employment by which the servant agrees that dan-

gers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers, the risk of which he agreed expressly to assume. The master is not, therefore, guilty of actionable negligence toward the servant. . . . This makes logical that most frequent exception to the application of doctrine which the employé who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if the injury results from the defect while he is waiting for repair of the defect, and has reasonable ¹⁵² ground to expect it. . . . If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize, as against a servant, an agreement, express or implied, on his part, to waive the performance of a statutory duty of the master, imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract, and it would entirely defeat this purpose thus to permit the servant to contract the master out of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute, and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that." This is perhaps the clearest expression of the reasons persuading some courts to hold that in such cases the maxim, "*Volenti non fit injuria*," will not apply. The point appears to have been touched upon in several English cases: See *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Baddeley v. Granville*, 19 Q. B. Div. 423. In the latter, the statute required a banksman to be present at the mouth of a pit when miners were going up and down. During the night it was the defend-

ant's practice to dispense with him, and of this the plaintiff was aware. The injury was in consequence of this omission. The court held that plaintiff could recover, Wills, J., saying: "There ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the ¹⁵³ protection of A. Such an agreement might be illegal. . . . But it seems to me that if the supposed agreement between the deceased and defendant, in consequence of which the principle of 'Volenti non fit injuria' is sought to be applied, comes to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself—such an agreement would be in violation of public policy, and ought not to be listened to." A careful reading of the opinions in *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, 10 S. W. 448, *Grand v. Michigan Cent. Ry. Co.*, 83 Mich. 564, 47 N. W. 837, *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, and *Boyd v. Brazil Block Coal Co.*, 25 Ind. App. 157, 50 N. E. 368, 57 N. E. 732, cited in the *Narramore* case, discloses that, although the question might have been raised, it was not in any of them. We think the learned judge, in writing that opinion, assumed too much, in treating the assumption of risk as purely a matter of contract. True, the books speak of it as resting on an implied agreement between the employer and employé. It is more accurate to say that the services of the one are engaged by the other, and from the relationship the law implies certain duties, obligations, and disabilities. No mention is made of these, but they pertain to the relationship of the parties and the status then assumed.

Says Mr. Dresser, in his valuable work on *Employers' Liability* (section 82): "The contract of hiring depends upon the same principles as other contracts, yet it has one peculiarity, in that it creates a status or relationship between the parties, to which the policy of the law has affixed certain rights, duties and disabilities to be observed by each, irrespective of any understanding or supposed agreement between them. These duties and disabilities arise when the relation is created, and continue until it ends, ¹⁵⁴ and for the most part are determined by the condition of affairs when the contract of hiring is made. It is usual and convenient to treat them as terms of an implied contract, but it is a contract implied from the relationship, and not

from the agreement of the parties, and has none of the incidents of a technical contract." The author then points out that no consideration is essential, as a mere volunteer may be in the same position as though hired, and an infant whose agreements are voidable may assume disabilities as an adult: See *Barstow v. Old Colony R. R. Co.*, 143 Mass. 535, 10 N. E. 255. If based on contract alone, then an action for injury by the servant, resulting from a breach of a duty assumed by the master, should be *ex contractu*. As said in *Jaggard on Torts*, 23: "Such rights and duties are not properly contractual, nor is their breach a contract wrong": See *Ames v. Union Ry. Co.*, 117 Mass. 541, 19 Am. Rep. 426. The breach is of a duty which the law implies from their relationship, and is, like any other omission of duty which the law exacts, negligence. The master's liability may be tested either by considering the employé's conduct, and answering whether, in view of his undertaking, he took his chance on the particular act of which complaint is made, or by ascertaining whether the employer owed the employé any duty in relation thereto. While the first may be the more convenient, the last is the more logical, as it would seem inquiry should be directed to ascertaining the existence of an obligation, before investigating its possible breach. The employé undertakes the performance of duties and services for compensation, and in doing so takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal assumption, the compensation is adjusted accordingly: *Farwell v. Boston etc. Corporation*, 4 Met. (Mass.) 49, 55, 38 Am. Dec. 339; that is, he engages to perform work under certain conditions. If these are not changed, no duty on the part of the master has been omitted. For ¹⁵⁵ instance, if he undertakes to operate defective machinery, the master owes him no duty to repair. In such a case there is no waiver of liability, because none has arisen. But if he knew nothing of the defects, and they were not obvious, the law implies the obligation of the master to put it in safe condition for use. As said in *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119: "The doctrine of assumption of risk of his employment by an employé has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, '*Volenti non fit injuria.*' One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another

who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty."

Nor can we approve of the distinction attempted to be drawn between employment under conditions condemned as dangerous at the common law, and those prohibited by a city ordinance. In the absence of an assumption of the risk, an omission of a duty implied by law is precisely as effective in fixing liability as though enjoined by statute. The obligation of the employer to the servant is no greater in the one case than in the other, and we can discover no sound reason for the discrimination which declares the danger in the one case may be assumed, and in the other ¹⁵⁶ may not. That advanced in two cited cases, to the effect that permitting the employé to waive the protection of a statute would be in contravention of sound public policy, we regard as untenable. The law implied is quite as much for his benefit as that enacted by the city council. If he knows and appreciates the danger, and understands his rights under the statute, there is no more reason for putting him under guardianship, and prohibiting him from waiving lapses in duty of obedience to a rule established by an ordinance or statute, than to one which the principles of justice and public policy raise, independent of legislation, for his protection. Beyond the right of action accruing for the violation of the master's obligation, regardless of its source, it is the punishment the state inflicts for the violation of the penal ordinance. The remedies are distinct, and the failure of the servant to demand his private remedy does not interfere with the exaction of a penalty by the state; nor, on the other hand, will the omission of the state to prosecute furnish the slightest obstacle to the maintenance of an action by the injured party. As said in the work from which we have already quoted: "It is difficult to see why, if the servant is given an action, he cannot barter it away before the cause of action accrues, as well as fail to bring it when he suffers injury. In neither case is the master's liability to the state affected, and the state ought not to call in the aid of an individual to enforce a policy it is competent itself to protect. For

many reasons, the servant may prefer to forego the protection; and as this does not change the master's obligation under the statute, or affect the welfare of the state, it should be permitted. The means of protection, through information to the proper authorities, are at hand, if the servant or another chooses to avail himself of them; and, if he is content to work without safeguards which he has a right to expect, the loss should be his. . . . If the decisions quoted are to be followed, the odd ¹⁵⁷ state of affairs will exist of a man who is merely careless being barred, but one deliberately undertaking a dangerous work recovering."

Some stress is laid on the impolicy of allowing persons to waive obedience of an ordinance or statute. It would seem quite as inimical to the public good to permit a workman to take advantage of the master's failure to obey the law to which he has consented, as to permit the master to avoid liability because the servant connived with him in such disobedience, by agreeing to work with the conditions as they existed, and according to the method mutually adopted. In other words, it is quite as obnoxious to public policy, independent of the penalty imposed, for the employé to aid and encourage the employer in his disregard of an ordinance, as for the employer to violate it. Our study of the subject has led to the conclusion that, in the matter of assumption of risks, it is immaterial whether they arise from the violation of a common-law duty or an obligation imposed by statute. As directly in point, see *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986; *E. S. Higgins Carpet Co. v. O' Keefe*, 25 C. C. A. 220, 79 Fed. 900; *Keenan v. Edison etc. Illuminating Co.*, 159 Mass. 379, 34 N. E. 366; *Dresser on Employers' Liability*, sec. 116. Also see 13 *Law Mag. & Rev.* 19; 3 *Elliott on Railroads*, sec. 1345; *Birmingham etc. Electric Co. v. Allen*, 99 Ala. 359, 13 South. 8; *Ford v. Chicago Ry. Co.*, 106 Iowa, 85, 75 N. W. 650. In the first of the above cases, the court, speaking through Bartlett, J., in referring to the claim that public policy required the rigid enforcement of a particular statute, and that this would be contravened by permitting an employé by contract to waive its protection, said: "We think this proposition essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action, whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or ¹⁵⁸ in the declared will of the legislature. Public policy in each case re-

quires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employé to assume the obvious risks of the business was in contravention of that policy. . . . The rule as to risks of service or ordinary risks is entirely distinct from the rule of obvious risks, and if the statute has added to the duties which the law enjoins upon the employer before the servant can be subjected to the rule of ordinary risks, then the default of the employer in the discharge of this statutory duty, resulting in the injury to the employé, would enable the latter to sue. Such a construction of the statute would not in any way limit the doctrine of obvious risks. . . . We are of opinion that there is no reason, in principle or authority, why an employé should not be allowed to assume the obvious risks of his business, as well under the factory act as otherwise. There is no rule of public policy which prevents an employé from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute indeed contemplates the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs." The appellant urges that as, under our statute, contracts exempting the company from liability are void, there can be no assumption of such a risk. The answer to this is, as already remarked, that in such a case no liability arises, and hence there is none from which the contract exempts. Possibly ordinances or statutes might be so framed as to prevent any assumption of risk, but certainly this is not true of an ordinance general in its terms, limiting the speed of trains in a particular locality. And it can make no difference whether the statute relates to the condition of the place where the work is to be done or the method ¹⁵⁹ to be pursued in performing it. If the employé, with full knowledge of either, undertakes to accomplish the task assigned at the place or in the method proposed, he ought not to be permitted to complain, when conditions and methods were precisely as he knew they would be, and to which he has assented.

2. The finding that deceased assumed the risk of injury from the excessive rate of speed within the corporate limits of the city of Davenport leads inevitably to an approval of the court's ruling in directing a verdict for defendant. It appears to have been deceased's duty to be on top and near the front of the train until the semaphore was reached. After that it was cus-

tomary to go to the engine. At the next station the helper engine was usually uncoupled and returned, though it frequently went as far as Turnout, three and six-tenths miles beyond Farnam. But two witnesses observed deceased shortly before the accident. Staffenbiel, a policeman, testified that he saw the train east of Marquette street, and noticed the head brakeman on top, about six cars from the engine, going forward. McMullen, the rear brakeman, testified: "I stayed on top till near the semaphore. . . . I saw Mr. Flanagan's light about the time I got to the semaphore. It was near the head end of the train. I could not tell how far from the engine. The light was higher up than it would be if it was setting on the car. I could not see the head end of the train, for smoke and steam which came directly back over the train. . . . I was on top till the engine got by the semaphore at Southwest Junction." He then went to the caboose. The appellee rightly insists, as we think, that the only reasonable inference to be drawn from the testimony is that deceased fell while attempting to step from the fourth to the third car in going forward to the engine. The latter was a foot lower than the former, and he may have lost his balance in stepping down, possibly not noticing ¹⁶⁰ the difference, in the dark and smoke from the engine. From the place where Staffenbiel saw him, he would likely have reached the end of the fourth car in an ordinary walk, while the train was moving to the point where he fell. The position of the light when last seen by McMullen obviates the inference suggested by appellant that he was sitting down, and he would not be likely to fall where he did when standing still. But whether he fell while attempting to step to another car, or while standing or sitting near the end, there is nothing in the record tending to explain the cause of the fall. It was still dark, with the smoke and steam trailing close to the train. The weather was cold, and rendered more disagreeable by the humidity of the atmosphere. But these were conditions which deceased was bound to anticipate when taking employment as brakeman. Whether they had anything to do with the accident can never be known. The jury could have found that the train was moving at from twelve to thirty miles an hour, but it is utterly impossible to say from the evidence that going faster than twelve miles an hour, with which deceased was familiar, caused him to fall, and that this would not have happened if moving at a less speed. If the cars swayed in passing over the blocks and switches, he knew that fact better than anyone else, and ought not to have

attempted to go to the engine until these were passed. Recovery must be had, if at all, because of negligence in the rate of speed. Compliance with the ordinance having been waived by deceased, in not only consenting, but assisting in operating defendant's trains at a rate of from eight to twelve miles an hour, there is no liability, unless it can be said that the speed at which this train run, above that mentioned, was not only negligence, but that it was the operating cause of the injury. As the speed above that mentioned, the risks of which he had assumed, cannot be said to have occasioned his death, we ¹⁶¹ need not inquire whether the defendant was negligent, independent of the violation of the city ordinance.

The ruling of the district court is approved, and its judgment affirmed.

Weaver, J., concurs in the result.

An Ordinance Limiting the Speed of trains while running through the municipality is designed for the protection of railroad employés as well as of the general public: *East St. Louis etc. Ry. Co. v. Eggmann*, 170 Ill. 538, 62 Am. St. Rep. 400, 48 N. E. 981; *Blue-dorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103.

Assumption of Risks.—When a servant engages to perform certain services, he assumes the risks incident thereto, whether they arise from the hazardous character of the service or from the negligence of other servants, but the master is bound to use due and reasonable care and diligence to provide proper materials and appliances to do the work and to select and employ competent and skillful fellow-servants: *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560, 53 Atl. 665; *McMillan v. Spider Lake etc. Co.*, 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979; *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 95 Am. St. Rep. 585, 66 N. E. 979. The authorities are not harmonious on the question whether the doctrine of assumption of risks applies where the master violates a positive statutory duty: See the monographic note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 586, 587; *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; *Davis Coal Co. v. Polland*, 158 Ind. 607, 93 Am. St. Rep. 319, 62 N. E. 492; *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827.

KINYON v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[118 Iowa, 349, 92 N. W. 40.]

NEGLIGENCE—Question for Jury.—It is error to withdraw from the jury any question of negligence alleged, and which the evidence tends to establish. (p. 386.)

RAILROADS—Negligence—Failure to Give Warning.—Even in the absence of statutory regulation, a railway company may be chargeable with negligence in failing to give reasonable warning before running its train over a public crossing. (p. 386.)

RAILROADS—Warnings at Crossings.—A statutory regulation fixing the minimum limit of distance within which a railroad must give warning upon approaching a crossing does not abrogate the common-law obligation requiring a warning at a greater distance, if, by reason of the speed of the train, or the peculiar dangers of the crossing, some earlier signal is dictated by reasonable caution. (p. 387.)

RAILROADS—Signals at Crossings.—Mere compliance with statutory requirements as to signals at crossings will not absolve railroad companies from any common-law duties which they are under, or excuse them from taking other reasonable precautionary measures, when their trains are crossing, or about to cross, public crossings. (p. 388.)

RAILROADS—Duty at Crossings.—Allegations that the statutory warnings were not given at a crossing by a railroad train, and that no sufficient warning was given to enable an avoidance of the accident, are broad enough to permit the application of the rule that care by such railroad company at the crossing, to be reasonable, must be proportionate to the existing danger. (p. 389.)

RAILROADS—Negligence—Rate of Speed.—Although a high rate of speed in the operation of a railroad train is not of itself negligence, yet it may become such at places of peculiar or extraordinary danger. (p. 390.)

NEGLIGENCE—Question for Jury.—In determining questions of negligence and contributory negligence, the jury must be allowed to consider all the facts and circumstances bearing upon the question, and not select one particular prominent fact as controlling the case to the exclusion of all others. (p. 391.)

NEGLIGENCE—Question for Jury.—If the evidence is conflicting as to the distance from a crossing at which a railroad whistle was sounded, that question must be left to the jury to determine. (p. 392.)

NEGLIGENCE—Contributory as Bar to Recovery.—To defeat a right to recover for negligence on the ground of contributory negligence it must in some manner or degree have contributed to the injury complained of. (p. 392.)

JURY TRIAL.—Instructions Partly Typewritten and partly handwritten are not objectionable on that ground. (p. 392.)

C. O. Kellogg, for the appellant.

Hubbard, Dawley & Wheeler and T. Arthur, for the appellee.

³⁵⁰ WEAVER, J. The plaintiff being the owner of thirty-nine steers, was driving them along the public highway and over a crossing of the defendant's railway track. Before the passage was entirely accomplished, a train moving at a high rate of speed approached the crossing, and a collision occurred, in which six of the steers were killed. The plaintiff alleges that this loss of his property was occasioned by the negligence of the railway company in the following particulars: That the whistle of the engine was not sounded as required by law; that the whistle was not sounded at all on approaching the crossing until within less than sixty rods of the crossing; that the view of approaching trains at the crossing was obstructed by a curve of the road through high banks, surmounted by brush and weeds; that the train was running at a dangerously high rate of speed, which was not slackened until within thirty or forty rods of the crossing; that at the same time defendant had negligently allowed several cars to stand near the crossing on the side of the main track from which plaintiff was approaching, thus further obstructing the view in the direction of the approaching train; and that by reason of the negligence so charged, and without contributory negligence on his part, his property was injured and destroyed; and he asks a verdict for damages. The defendant denies all ³⁵¹ of the allegations of the petition. There was a verdict and a judgment for the defendant, and plaintiff appeals.

Upon the trial the ownership of the cattle by the plaintiff was conceded, as also that they were killed by collision with defendant's engine at the time and place charged, the only contest remaining being upon the question of defendant's alleged negligence in respect to such accident, and plaintiff's want of contributory negligence. The plaintiff's evidence tended to show that, with the aid of one Jones, he was taking the herd along a highway running near and parallel to the defendant's right of way, and on approaching another road, which crossed the railway at right angles, Jones rode his horse to the front, and turned the cattle in the direction of the railway crossing, while plaintiff followed behind them; that the cattle were moving in a bunch of about fifty feet in length along the path; that Jones went to the railway crossing and looked and listened for approaching trains, and, discovering none, allowed the cattle to cross the track, but before the passage was effected the collision occurred. There was, to say the least, some evidence tending to sustain each of the allegations of negligence set out in the

petition. Most of it is denied by defendant's witnesses, but the truth of the dispute was in each instance a matter for the jury.

At the conclusion of the testimony, the plaintiff requested the court to instruct the jury as follows: "1. You are instructed that a traveler about to approach a railroad, intending to cross at a public crossing, has a right to presume that the whistle of an engine will be sounded, as required by statute, at least sixty rods before arriving at the crossing. So, if you find that in this case the plaintiff and the man Jones looked and listened before crossing the track at the time of the accident, they had a right to rely upon the fact that the whistle would be blown, and they were not obliged to continue looking and listening for the approach of a train. 2. You are instructed that ³⁵² the testimony in the case shows that the crossing at the place where the accident occurred was a dangerous one, and it was the duty of the engineer in charge of the train which collided with the cattle to have sounded the steam whistle of the engine in sufficient time to have warned plaintiff, approaching the crossing, so that the accident could have been avoided by the use of ordinary care on the part of the plaintiff. 3. You are instructed that the statutes of the state require that the whistle of each locomotive engine must be sounded at least twice, sharply, at least sixty rods before arriving at a public highway crossing over the railroad at grade; but at a dangerous crossing, such as the one in controversy, if the train should be running at a high rate of speed, whistle should be sounded at a greater distance, if it is necessary to do so in order to warn travelers about to cross the track at said crossing." These requests were refused. In the instructions given upon its own motion, the court, in effect, withdrew from the consideration of the jury all allegations of negligence, except the one based upon the alleged failure of the defendant to sound the warning signal at least sixty rods from the crossing. Of these instructions, it is necessary to set out only the following: "2. It is claimed by the plaintiff that the defendant's agents and employes were negligent in failing to sound the necessary warning by whistle when approaching the crossing in question, and that by reason of such failure the cattle in suit were run upon and killed. This is the only particular wherein plaintiff claims that the defendant was negligent, and will be the only one considered by you in your determination of the case. . . . 4. It must appear from the evidence that the defendant, in operating the train in question, was negligent in failing to sound the whistle as required by law

in approaching said crossing. This is the matter wherein plaintiff claims defendant was negligent. The statutes of this state, among other things, provide: 'A ³⁵³ bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached,' etc., 'and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect.' If it appears from the evidence, by the greater weight thereof, that at the time of the accident in question, in which plaintiff's said cattle were killed, that the employes of the defendant in charge of the engine hauling said train failed to twice sharply sound the whistle on said engine at least sixty rods before reaching said crossing, such failure on the part of such employes would be sufficient to constitute negligence in the operation of said train on the approach of said crossing. But unless it appears from the evidence, under the rules above given, that said employes of the defendant did fail to sharply sound said whistle twice at least sixty rods before reaching said crossing, then the plaintiff cannot recover. Whether said employes did sound said whistle, at least sixty rods before approaching said crossing, twice, sharply, as above required, is a question of fact to be determined by you from all the testimony before you throwing light thereon. This is one of the main questions of fact to be decided by you, and should be the first one decided by you when you begin the consideration of the case. . . . 8. If you find from the evidence that plaintiff or said Jones heard the approaching train when it was sixty rods or more north of said crossing, then the failure to sound the whistle, if any such there was, did not cause or contribute to such accident, and you should find for the defendant. ^{8½}. There is some testimony before you showing that the plaintiff did not stop said cattle, or cause the same to be stopped, until he could ascertain whether or not a train was approaching. He is required to use ordinary care and caution—such care and caution as an ordinarily prudent man ³⁵⁴ would use under like circumstances—and, if such care and caution would require that he stop said cattle to investigate, then failure to do so would constitute negligence upon his part and he cannot recover. But unless ordinary care and caution, under the facts of this case, would require that he take such step, and stop said cattle for such purpose, he would not be negligent in failing to do so."

1. There was error in withdrawing from the jury all question of defendant's negligence, other than the alleged failure of the trainmen to signal for the crossing. The negligence charged in the petition is not predicated alone upon the naked failure to sound the whistle at least sixty rods from the crossing, but upon that fact taken in connection with the high rate of speed at which the train is claimed to have approached, and the obstructions by which the view of the track in the direction of the train was limited or obscured. Plaintiff was entitled to go to the jury upon every fact alleged in his petition and denied by the answer, so far, at least, as evidence had been produced tending to sustain them; and, as we have already said, there was testimony proper to be considered upon each of the several allegations of negligence. It is very possible that proof of any one of the matters charged would not have been sufficient to justify a finding of negligence against the defendant, and yet, when considered together, they may be ample to sustain such a verdict. For instance, it is a settled doctrine in this state that the movement of a train at a very high rate of speed is not in itself negligence (*McKonkey v. Chicago etc. R. R. Co.*, 40 Iowa, 205; *Cohoon v. Chicago etc. Ry. Co.*, 90 Iowa, 174, 57 N. W. 727), but it has never been held that a high rate of speed may not, under some circumstances, become negligence. In *Artz v. Chicago etc. R. R. Co.*, 44 Iowa, 285, discussing the effect of an instruction that "the rate of speed, though not regulated by law, may be considered with other facts tending to establish negligence," we said: "While a railway ³⁵⁵ is not restricted by law to any rate of speed, unusual speed at crossings or at other places where men or brutes may be exposed to danger from passing trains may be considered, in connection with other matters—as the failure to give signals of the approach of the train, and the like—to determine the want of care on the part of those operating it. This rule has always been recognized in this state." It would be difficult to conceive a case coming more clearly within this rule than the one sought to be proved by the plaintiff in the present instance. He alleges and offers evidence to show that the train was running very rapidly, and that the place was one of more than ordinary danger, by reason of the curve in the track, the high banks, the cars upon the sidetrack, and the failure to give proper signals of the approach of the train. All these matters, then, were material in determining whether there was any want of reasonable care by the defendant,

as charged, and should have been submitted to the jury with appropriate instructions.

2. The tenor and effect of the instructions given were to impress upon the jury the thought that, if the whistle of the engine was sounded sixty rods from the crossing, the defendant had discharged its whole duty. This idea was expressly or impliedly repeated in various forms throughout the charge. There are a few cases which tend to sustain the doctrine announced by the learned trial court in this respect (*Beisiegel v. New York etc. R. R. Co.*, 40 N. Y. 9; *Grippin v. New York etc. R. R. Co.*, 40 N. Y. 34); but, as we shall endeavor to show, it is not in accordance with the weight of authority. Even when there is no statutory regulation, a railway company may be chargeable with negligence for failing to give reasonable warning before running its train over a public crossing: *Shearman and Redfield on Negligence*, sec. 484; *Artz v. Chicago etc. R. R. Co.*, 34 Iowa, 158; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679; ³⁵⁶ *Tolman v. Syracuse etc. R. R. Co.*, 98 N. Y. 198, 50 Am. Rep. 649; *Loucks v. Chicago etc. Ry. Co.*, 31 Minn. 526, 18 N. W. 651; *Guggenheim v. Lake Shore etc. R. R. Co.*, 57 Mich. 488, 24 N. W. 827; *Thompson v. New York etc. R. R. Co.*, 110 N. Y. 636, 17 N. E. 690; *Harty v. Central R. R. Co.*, 42 N. Y. 468. And in such cases the place where and the distance at which reasonable care requires the warning to be given must, of necessity, depend upon circumstances. It is a matter of common observation that railway crossings are not all equally dangerous; varying, as they do, from the intersection of straight tracks upon the open prairie, with unobstructed view for miles in every direction, to the crossing of sharply curved tracks in deep cuts, where an extended view is impossible. It is obvious that, taking one extreme, it is hardly possible for a traveler upon the highway to collide with a passing train without gross negligence upon his own part, while in the other case he may quite readily be run down and injured when in the exercise of all reasonable care for his own safety. The general common-law rule that care, to be reasonable, must be proportioned to the danger to be avoided, applies here, as in other cases of alleged negligence; and that rule affects not only the traveler who ventures upon the crossing, but the railway company which operates its trains over the track.

Turning to the statute, we find the provision to be that the whistle of the engine shall be sounded "at least sixty rods before a crossing is reached." The effect of this is to indicate the kind

of warning which must be given, and the minimum limit within which the duty must be performed, but does not abrogate the common-law obligation which would require a warning at a greater distance, if by reason of the speed of the train, or the peculiar dangers of the crossing, some earlier signal is dictated by reasonable caution: 1 Rorer on Railroads, 529; Atchison etc. R. R. Co. v. Hague, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; Richardson v. New York etc. R. R. Co., 45 N. Y. 846; Eaton v. Fitchburg R. R. ³⁵⁷ Co., 129 Mass. 364; Barry v. New York Cent. etc. R. R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Bradley v. Boston etc. R. R. Co., 2 Cush. 539; English v. Southern Pac. Co., 13 Utah, 407, 57 Am. St. Rep. 772, 45 Pac. 47. In other words, the warning must be timely, and timeliness depends upon the facts and circumstances of each case: Eskridge v. Chicago etc. Ry. Co., 89 Ky. 367, 12 S. W. 580; Philadelphia etc. R. R. Co. v. Stinger, 78 Pa. St. 219. In the case of Hart v. Chicago etc. R. R. Co., 56 Iowa, 170, 41 Am. Rep. 93, 7 N. W. 9, 9 N. W. 116, we said the doctrine that "mere compliance with statutory requirements will not absolve the railroad corporations from any duties which they were under before, or excuse them from taking other reasonable precautionary measures when their trains are crossing or about to cross a highway, is well settled. In case of collision, it is for the jury to say whether such measures have been adopted, and whether, under the circumstances of the case, the railroad company has used reasonable care to prevent it." This precedent is authoritative, and commends itself to our judgment as announcing a just and salutary rule of law, in the light of which the restriction placed by the trial court upon the right of plaintiff to recover must be regarded as error. Appellee's contention that plaintiff's petition is not broad enough to call for an application of this principle of law is not well founded. The allegation made in this respect is that the plaintiff received no "notice or warning of the approach of the train at said time and place until said engine was almost to the crossing; . . . that defendant carelessly failed and neglected to sound the whistle of said engine as required by section 2072 of the Code of Iowa, and did not sound the whistle at all in approaching said crossing at said time until within less than sixty rods," etc. It is again alleged that "the said cattle were so killed or injured by reason of the carelessness of the defendant in not giving or causing to be given to plaintiff or to said Jones, sufficient warning of the ³⁵⁸ approach of said engine and train as aforesaid

in time so that plaintiff or said Jones, or both of them, by the use of ordinary care and diligence, could have driven the said cattle from the crossing before its arrival, and in time to avoid said accident, and by reason of the carelessness and negligence of the defendant in not sounding the whistle of said engine as required by law," etc. This is not, as counsel seem to think, a simple charge that the engineer failed to sound the whistle sixty rods from the crossing, but it goes further, and charges a negligent failure to sound it in a reasonable time to give the necessary notice or warning of the approach of the train.

3. Appellee justifies the refusal of the court to admit evidence as to the speed of the train, and to instruct the jury upon the question of speed, as related to the charge of negligence, on the principle we have already recognized—that no rate of speed is in itself negligence, and because it is said such claim was waived on the trial. This latter idea is based on the fact that when plaintiff offered to prove the speed of the train, and objection was made thereto, the following colloquy occurred between court and counsel: "By the Court: Wherein do you claim it is material, Mr. Kellogg? By Mr. Kellogg, Attorney for Plaintiff: We allege here that it was negligence for the railway company to operate its train at a high rate of speed at a place where they knew it was dangerous, without sounding or causing to be sounded the whistle of the engine before arriving at the crossing a sufficient length of time to warn people who were approaching there to get out of danger. This is the object of this—that it was incumbent upon them to sound the whistle. Court: The statute fixes that, without any question of speed, doesn't it? Mr. Kellogg: I think it does." This, it is said, is a concession that the rate of speed is immaterial, so long as the whistle is sounded within sixty rods from the crossing. We do not so construe it. Counsel for ³⁵⁹ plaintiff stated with clearness his claim that, where the company knows that a crossing is dangerous, it is negligent to operate a train over such a crossing at a high rate of speed without giving reasonably sufficient warning to persons traveling the highway, and, in pursuance of that claim, offered one or more instructions asking that the jury be so charged. It is unnecessary to repeat the proposition as to the absence of any presumption of negligence from the mere fact of the great speed at which the train is operated. The reasonableness of that rule is apparent. The great purpose to be subserved by railroads is promptness, speed and dispatch in carrying passengers and freight; and under or-

ordinary circumstances, in the open country, there is no duty resting upon the companies to slacken the pace of their trains at crossings. To hold otherwise, so long, at least, as grade crossings are the rule instead of the exception, would be to neutralize and to a great extent destroy the advantages derived from modern facilities for transportation. But the right thus conceded is not without its attendant obligations, and if by reason of natural or artificial obstructions to the view of the traveler upon the highway, or of the course of the track around curves or through high embankments, the crossing is of peculiar or extraordinary danger, the operation of the railway must be conducted with reference to that fact: *Artz v. Chicago etc. R. R. Co.*, 44 Iowa, 285; *Hart v. Chicago etc. R. R. Co.*, 56 Iowa, 172, 41 Am. Rep. 93, 7 N. W. 9, 9 N. W. 116; *Courson v. Chicago etc. R. R. Co.*, 71 Iowa, 29, 32 N. W. 8; *Freeman v. Duluth etc. Ry. Co.*, 74 Mich. 86, 41 N. W. 872; *Lehigh Valley R. R. Co. v. Brandtmaier*, 113 Pa. St. 610, 6 Atl. 238; *Czech v. Great Northern Ry. Co.*, 68 Minn. 38, 64 Am. St. Rep. 542, 70 N. W. 791, *Ellis v. Lake Shore etc. R. R. Co.*, 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. Rep. 914; *Childs v. Pennsylvania R. R. Co.*, 150 Pa. St. 73, 24 Atl. 341; *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559; *Shaber v. St. Paul etc. Ry. Co.*, 28 Minn. 103, 9 N. W. 575. In *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346, the court says: "It is clearly the duty of a railroad company, as it is of a natural person, to exercise its rights with a considerate and prudent regard for the rights and safety of others; and, for injuries occasioned by negligence, both are responsible. Nor is it any excuse or justification that the act occasioning the injury was in itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which the injury was done." This language was quoted approvingly by us in *Hart v. Chicago etc. R. R. Co.*, 56 Iowa, 172, 41 Am. Rep. 93, 7 N. W. 9, 9 N. W. 116. Bearing in the same direction is the language of the supreme court of the United States: "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surround-

ings of each particular case, and say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs": *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679. In the *Childs* case, above cited, the Pennsylvania court says: "The movement of trains must be regulated by railroad companies in the exercise of business discretion, and upon consideration of the competition they have to encounter, and the necessities of modern business. We do not think a jury may fix the maximum rate of speed at which a train may be moved in the open country, or that a high rate of speed is negligence per se. But while railroad companies may move their trains at such rate of speed as the character of their machinery may make practicable, they must not forget that increased speed for the train means ³⁶¹ increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty." The soundness of the principle announced by these authorities is beyond question, and the failure of the trial court to observe it in instructing the jury could not have been otherwise than prejudicial to the plaintiff. As a rule, instructions offered by counsel are not so framed that the court is justified in giving them literally as asked, but, if the main thought sought to be expressed contains a pertinent legal principal which is not already fully covered by other instructions given, the court should embody it in proper words in its own charge. Thus it may be said of the instructions asked by plaintiff in the present case that they are perhaps objectionable in form, and assume certain controverted facts as established, but they did present a phase of the law in harmony with the conclusions we have herein announced, which should have had recognition by this court.

For like reasons, there was error in the eighth instruction, whereby the jury were told that, if plaintiff heard the train when it was sixty rods from the crossing, there could be no recovery. The mere fact that he may have heard the train when sixty rods away will not of itself justify the court in saying, as a matter of law, that there was no negligence on the defendant's part, or that there was contributory negligence on the plaintiff's part; but the jury should have been permitted to consider it in connection with and in the light of all the other circumstances alleged in the pleadings and shown by the testimony. In determining questions of negligence and contributory negligence, the jury must "consider all the facts and circumstances bearing upon the question, and not select one particular prominent fact

or circumstance as controlling the case, to the exclusion of all others": *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679; *Cooper* ³⁶² *v. Lake Shore etc. Ry. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11, 9 Am. St. Rep. 387, 13 Atl. 387.

4. The appellee argues that as defendant's evidence shows the whistle was sounded at the sixty-rod limit, and plaintiff and his witnesses claim not to have heard it, then to have given the signal at a further distance from the crossing would have been useless; for, if not heard at the lesser distance, it would not have been any more effectual at the greater. This requires us to assume that the defendant's witnesses are right, and the plaintiff's witnesses are wrong, which we cannot do. The plaintiff and several other witnesses swear positively that the whistle was not sounded until the cattle alarm was given within thirty or forty rods of the crossing, and, although the trainmen and others who ought to know, testify to the contrary, it remains a question for the jury to determine: *Kansas City etc. R. R. Co. v. Lane*, 33 Kan. 702, 7 Pac. 587; *Roberts v. Chicago etc. Ry. Co.*, 35 Wis. 679; *Hughes v. Chicago etc. Ry. Co.*, 88 Iowa, 404, 55 N. W. 470; *Moore v. Chicago etc. Ry. Co.*, 102 Iowa, 599, 71 N. W. 569.

5. The instruction marked "8½" is objectionable in so far as it states to the jury that there is "evidence showing plaintiff did not stop the cattle" before going upon the crossing, as it was the exclusive province of the jury to find what was shown or established by such evidence. It is also defective in its statement that, if reasonable care required that he stop the herd at that point, "then a failure to do so would constitute negligence upon plaintiff's part, and he cannot recover." In order to defeat plaintiff's right to recover on the ground of his own negligence in this or any other respect, the jury should further find that such negligence in some manner or degree contributed to the injury of which he complains. That essential element ³⁶³ being omitted from the instruction—inadvertently, no doubt—makes the proposition there stated misleading.

The further objection made by appellant that this instruction was given to the jury in writing, while the remainder of charge was printed upon a typewriter, we think without merit. It is a matter of everyday occurrence in the trial courts that, after instructions have been put in form upon the typewriter, errors and omissions are discovered, and proper corrections are made in writing with pencil or pen; and it requires considerable in-

genuity to discover any prejudice arising from it, unless it be to the patience of the jury in deciphering the manuscript additions.

Other questions argued are more or less directly governed by the conclusions we have announced, and need not be further considered.

The judgment of the district court is reversed.

Railroad Crossing—Signals.—Compliance by a railroad company with the statutory requirements as to giving signals at crossings does not relieve it from a charge of negligence in failing to adopt such other reasonable measures for public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances: *English v. Southern Pac. Co.*, 13 Utah, 407, 57 Am. St. Rep. 772, 45 Pac. 47; *Florida etc. R. R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 338; *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; *Houston etc. Ry. Co. v. Boozer*, 70 Tex. 530, 8 Am. St. Rep. 615, 8 S. W. 119; monographic note to *Baltimore etc. R. R. Co. v. Breinig*, 90 Am. Dec. 63. See, too, *Mason v. Southern Ry. Co.*, 58 S. C. 70, 79 Am. St. Rep. 826, 36 S. E. 440. Independently of statute, it is the duty of persons having charge of trains to give notice of their approach at all points of known or reasonably apprehended danger: *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181; *Czech v. Great Northern Ry. Co.*, 68 Minn. 38, 64 Am. St. Rep. 452, 70 N. W. 791; *Hinkle v. Richmond etc. R. R. Co.*, 102 N. C. 472, 26 Am. St. Rep. 581, 13 S. E. 884.

Running Trains at a High Rate of Speed is not necessarily negligence: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939, and cases cited in the cross-reference note thereto. The speed at which they may be run without negligence depends upon the locality and circumstances: *Schexnadrye v. Texas etc. Ry. Co.*, 46 La. Ann. 248, 49 Am. St. Rep. 321, 14 South. 513; *Hicks v. New York etc. R. R. Co.*, 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721. It is negligence to run them at an excessive speed at crossings, or where the track is curved, or in thickly settled localities: *Ellis v. Lake Shore etc. R. R. Co.*, 138 Pa. St. 506, 21 Am. St. Rep. 914, 21 Atl. 140; *St. Louis etc. Ry. Co. v. Stewart*, 68 Ark. 606, 82 Am. St. Rep. 311, 61 S. W. 169; *Highland Ave. etc. R. R. Co. v. Robbins*, 124 Ala. 113, 82 Am. St. Rep. 153, 27 South. 422; *Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852; monographic note to *Baltimore etc. R. R. Co. v. Breinig*, 90 Am. Dec. 64.

KOCH v. WEST.

[118 Iowa, 468, 92 N. W. 663.]

EQUITY—Action to Quiet Title—Proof of Allegations.—The plaintiff in an action to quiet title must prove the title as alleged by him. (p. 394.)

CONVEYANCES—Acknowledgment—Failure of Notary to Affix His Seal.—The authentication by the notary's seal is just as essential to a perfect acknowledgment as is his signature, and when a deed lacks this, it is not entitled to be recorded. (p. 395.)

CONVEYANCES—Recording—Index.—A purchaser is not bound to look beyond the proper index for information as to conveyances, and if such index shows none, there is no constructive notice of any. (p. 395.)

CONVEYANCES—Defective Acknowledgments.—A curative statute relating to defective acknowledgments does not affect vested rights. (p. 396.)

JUDICIAL SALES.—Inadequacy of Consideration for a purchase at judicial sale does not affect the good faith of the purchaser. (p. 396.)

J. F. Smith, for the appellant.

Casey & Stewart and W. E. Blake, for the appellee.

470 SHERWIN, J. 1. The relief asked by the plaintiff, Koch, is based on the ground that he is the owner of the fee title of the land in controversy. The allegations of his petition must, therefore, be proven, and, if he has failed in this respect, he is not entitled to judgment: *Costello v. Burke*, 63 Iowa, 361, 19 N. W. 247.

2. We think there is evidence tending to prove that Noah Huett, the grantee of Phœbe and John Shefler, died intestate sometime in 1885, seised of the land in question. On the twenty-seventh day of May, 1887, a decree was entered in partition proceedings in the district court of Lee county which adjudged that Noah Huett died seised of this land, and which determined who his heirs were, and their interest in his estate, and ordered the land sold to make partition thereof, except the one-third interest of Mary Huett, his widow. Referees were **471** named therein, who seem to have acted, and who reported that they had sold the southeast one-fourth of the northeast one-fourth of section 10 to the plaintiff Koch. The decree shows the approval of their report and sale to Koch, and they were therein authorized to convey the same to him, which they afterward did. This defendant was not a party to the partition proceeding, and is not bound by the decree therein rendered: *Arnold v. Construc-*

tion Co., 35 Iowa, 99. And if it stood alone as evidence of the death of Huett, and as to his heirs, it would clearly be insufficient to support this link in the plaintiff's chain of title: Costello v. Burke, 63 Iowa, 361, 19 N. W. 247; McBride v. Harn, 48 Iowa, 151; Ross v. Loomis, 64 Iowa, 432, 20 N. W. 749. As we have said, there is, perhaps, evidence enough, aside from the decree, to establish the death of Noah Huett; but we are unable to find any which shows whether he died testate or intestate, or which tends to prove who his heirs were. It is therefore extremely doubtful whether the plaintiff, Koch, has proven the title under which he claims with the certainty required.

3. There is, however, another feature of the case which we conclude is absolutely fatal to the success of Koch; and, in our discussion of this question, we shall assume that there was in reality a bona fide conveyance from John Shefler to his wife, Phœbe, on September 15, 1882. Whichever version of the transaction—that given by the wife, or that given by the husband—may be correct, it is absolutely beyond question that the seal of the notary who took the acknowledgment was not impressed on the deed; and further than this, the plaintiff has just as signally failed to show that this deed, when filed, was indexed in any manner. The authentication of the notary's seal is just as essential to a perfect acknowledgment as is his signature; and, when the deed lacks this, it cannot properly be recorded: Pitts v. Seavey, 88 Iowa, 336, 55 N. W. 480; Kreuger v. Walker, 80 Iowa, 733, 45 N. W. 871; ⁴⁷² Hiles v. Atlee, 90 Wis. 72, 62 N. W. 940; Greenwood v. Jenswold, 69 Iowa, 53, 28 N. W. 433.

4. The purchaser is not bound to look beyond the proper index for information as to conveyances, and, if the index shows none, there is no constructive notice of any: Noyes v. Horr, 13 Iowa, 570; Howe v. Thayer, 49 Iowa, 154. The defendant's assignor, Versteeg, was a purchaser at a judicial sale; and, if he purchased without actual or constructive notice of the conveyance of John Shefler to his wife, he was entitled to protection against claims derived through or based upon such conveyance, and the defendant succeeds to his right in this respect: Evans v. McGlasson, 18 Iowa, 152; Gower v. Dohency, 33 Iowa, 33; Greenwood v. Jenswold, 69 Iowa, 53, 28 N. W. 433; May v. Sturdivant, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221; Freeman on Executions, 3d ed., sec. 336. That the record of the deed in question did not impart constructive notice to anyone is clear, and there is an entire absence of evidence tending even to

show that the defendant had actual notice thereof. This holding is not in conflict with the line of cases in this state and elsewhere which define the rights between an unrecorded conveyance and a judgment lien: See *Hoy v. Allen*, 27 Iowa, 208; *Norton v. Williams*, 9 Iowa, 528; *Chapman v. Coats*, 26 Iowa, 288; *Atkinson v. Hancock*, 67 Iowa, 452, 25 N. W. 701; *Matless v. Sundin*, 94 Iowa, 111, 62 N. W. 662. In fact, the rule applied here is distinctly recognized in many of them.

It is contended, however, that because of the conveyance of the Sheflers to Huett, and the possession of the plaintiff under his conveyance, the defendant had full notice of his claim. But this cannot be so, because there was nothing in this conveyance to indicate that it was antagonistic to the lien of the Nichols, Sheppard & Co. judgment, or that indicated any legal or equitable right in Phoebe Shefler or in the plaintiff, other than what he would have under a conveyance from John Shefler alone; ⁴⁷³ and this is the situation, also, regarding the possession. Up to the time of their conveyance to Huett, the Sheflers were in possession as a family, with the record title standing in the husband; and, the conveyance being from them jointly, the possession of the plaintiff did not indicate hostility to the record title: *Rogers v. Hussey*, 36 Iowa, 664.

5. It is further contended that the defect in the acknowledgment of the deed in question was cured by chapter 42 of the acts of the twenty-fourth general assembly, which was a curative act, taking effect March 24, 1892. But the act itself expressly provides that it shall not apply to vested rights, and the rights of the defendant herein became vested when he paid his money for the sheriff's certificate of sale, January 15, 1892, which was before the act became effective: *Freeman on Executions*, 3d ed., sec. 336.

6. There is nothing in the record tending to show that either Versteeg or the plaintiff were not purchasers in good faith. Inadequacy of consideration, alone, is not sufficient to maintain the claim, and, when the purchase is made at a judicial sale, has no force at all.

The facts in this case do not warrant the claim that the forty in controversy was the homestead of the Sheflers. They owned one hundred and twenty acres, in a connected body, and lived on the middle forty thereof. No homestead had ever been selected or platted by them or for them, and, whatever merit this claim might have as to the forty on which they lived, it has none here.

A motion to strike the amended abstract filed by the appellee was submitted with the case, as was also a motion to strike the appellee's argument. The conclusion reached by us on the merits makes a ruling on the motions unnecessary.

The judgment is reversed.

A Deed may be Recorded so as to impart constructive notice, according to many authorities, although not properly indexed: See the monographic note to *Green v. Garrington*, 91 Am. Dec. 109; *Davis v. Whitaker*, 114 N. C. 279, 41 Am. St. Rep. 793, 19 S. F. 699. Other authorities take a different view: *Ritchie v. Griffiths*, 1 Wash. 429, 22 Am. St. Rep. 155, 25 Pac. 341; *Hiles v. Atlee*, 80 Wis. 219, 27 Am. St. Rep. 32, 49 N. W. 816; *Hibbard v. Zenor*, 75 Iowa, 471, 9 Am. St. Rep. 497, 39 N. W. 714. See, in this connection, *Farabee v. McKerrihan*, 172 Pa. St. 234, 51 Am. St. Rep. 734, 33 Atl. 583; *Pyles v. Brown*, 189 Pa. St. 164, 69 Am. St. Rep. 794, 42 Atl. 11; *Cady v. Purser*, 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844; *McKenna v. Van Blarcom*, 109 Wis. 271, 83 Am. St. Rep. 895, 85 N. W. 322.

A Notary Public is required to attach his seal to his official acts, and his certificate, unauthenticated by the impression of such seal, is held void: *Welton v. Atkinson*, 55 Neb. 674, 70 Am. St. Rep. 416, 76 N. W. 473.

Curative Statutes may be enacted to correct errors in deeds, mortgages, and other instruments: *Wingert v. Zeigler*, 91 Md. 318, 80 Am. St. Rep. 453, 46 Atl. 1074; *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227, 29 South. 421; *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008. But a curative statute undertaking to take away vested rights is void: *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561, 88 N. W. 989.

THE EFFECT OF THE DEFECTIVE RECORDING OF LEGAL INSTRUMENTS UPON THE RIGHTS OF THIRD PERSONS.*

- I. Conflict as to the General Rule.
 - a. Defective Record of no Avail.
 - b. Defective Record Imparts Notice.
 - c. Omission of the Seal.
- II. Transcribing Instruments in the Wrong Book.
 - a. Two Views.
 - b. Mixed Mortgages.
 - c. Absolute Deed Intended as Mortgage.
- III. What Errors do not Avoid the Record.
 - a. Slight and Immaterial.
 - b. Sufficient to Put a Searcher on Inquiry.
- IV. Indorsements upon Instruments of Time of Reception.
- V. Necessity for an Index.
 - a. Generally no Part of the Records.
 - b. The Minority Rule.
 - c. Mistakes in Index Sufficient to Put Party on Inquiry.
 - d. Index and Record Book to be Taken Together.
 - e. What is a Suitable Index.

*REFERENCES TO MONOGRAPHIC NOTES.

Effect of defects in registration of conveyances: 91 Am. Dec. 106.
What is filing of papers: 15 Am. St. Rep. 294.

I. Conflict as to the General Rule.

a. **Defective Record of no Avail.**—Perhaps on no question of law is there a greater diversity of opinion among the authorities than on that dealing with the effect of defective registrations of legal instruments. In order to give constructive notice of conveyances and encumbrances, statutes have been generally enacted throughout this country providing that they shall be of no effect as against third persons, such as creditors or purchasers, unless duly recorded as there required.

One line of cases holds that if a mistake is made by the recording officer, any loss consequent thereon must be borne by the party recording the instrument; that notice is given by the records only of the facts therein appearing; and one relying on such records need not go beyond them to ascertain their truth or falsity. "Hard and uncertain would be the fate of subsequent purchasers if they could not rely upon the records, but must be under the necessity, before they act, of tracing up the original deed to see that it is correctly recorded. The statute says that when the deed is certified and recorded it shall impart notice of the contents from the time of filing. Certainly; but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. It never was intended to impose upon the purchaser the burden of entering into a long and laborious search to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests on the party holding the title. If he fails in his duty, he must suffer the consequences. If his duty is but imperfectly performed, he cannot claim all the advantages and lay the fault at the door of an innocent purchaser": *Terrell v. Andrew County*, 44 Mo. 309, in accord with which are the following: *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *State v. Davis*, 96 Ind. 539; *Miller v. Bradford*, 12 Iowa, 14; *Disque v. Wright*, 49 Iowa, 538; *Taylor v. Hotchkiss*, 2 La. Ann. 917; *Stedman v. Perkins*, 42 Me. 130; *Hill v. McNicholl*, 76 Me. 314; *Brydon v. Campbell*, 40 Md. 331; *Barnard v. Campau* 29 Mich. 162; *Parret v. Shaubhut*, 5 Minn. 323, 80 Am. Dec. 424; *Thorp v. Merrill*, 21 Minn. 336; *Frost v. Beekman*, 1 Johns. Ch. 288; *Beekman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246; *Jennings v. Wood*, 20 Ohio, 261; *Sanger v. Craigie*, 10 Vt. 555; *Potter v. Dooley*, 55 Vt. 512; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *White v. McGarry*, 2 Flip. (U. S.) 572, 47 Fed. 420.

Where, therefore, the amount set forth in a conveyance is copied by the recorder as being smaller than it there appears, notice of the amount on the records only is conveyed: *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *State v. Davis*, 96 Ind. 539; *Hill v. McNicholl*, 76 Me. 314; *Beekman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246; and the same rule applies to the amount or interest of property transferred: *Miller v. Bradford*, 12 Iowa, 14; so where "four-tenths" of land con-

veyed is copied as "one-fourteenth," notice of the latter amount only is given: *Brydon v. Campbell*, 40 Md. 331. Where, however, there is a false and impossible part added to the description, it does not vitiate it, if otherwise valid: *Thorwarth v. Armstrong*, 20 Minn. 464.

Where a mistake in transcribing a deed on the records is claimed to have occurred, the description of the property made by the recorder in the reception book, as required by law, is admissible in evidence; and, in connection therewith the fact that the land described in the reception book was owned by the grantor, and that he did not own that set forth in the record: *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. 614.

b. Defective Record Imparts Notice.—The opposite view is that the party leaving the deed or mortgage with the proper officer to be recorded has thereby done all he need, that it would be harsh and inequitable to make the stability of his title depend upon a performance of duties imposed by law upon an officer whom he has no choice but to engage; and that notice of the original deed is imparted to the world; although incorrectly transcribed or not copied at all; and the following cases so hold: *Mims v. Mims*, 35 Ala. 23; *Oats v. Walls*, 28 Ark. 244; *Case v. Hargadine*, 43 Ark. 144; *Judd v. Woodruff*, 2 Root (Conn.), 298; *Merrick v. Wallace*, 19 Ill. 486; *Kiser v. Houston*, 38 Ill. 252; *Craig v. Dimack*, 47 Ill. 308; *Chandler v. Scott*, 127 Ind. 226, 26 N. E. 797; *Lee v. Birmingham*, 30 Kan. 312, 1 Pac. 73; *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84; *Faxon v. Ridge*, 87 Mo. App. 299; *Bedford v. Tupper*, 30 Hun, 174; *Ridley v. McGehee*, 13 N. C. (2 Dev. L.) 40; *Nichols v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 238; *Parrish v. Mahany*, 10 S. Dak. 276, 66 Am. St. Rep. 715, 73 N. W. 97; *Throckmorton v. Price*, 28 Tex. 605, 91 Am. Dec. 334; *Freiberg v. Magale*, 70 Tex. 116, 7 S. W. 684; *Cleveland v. Empire Mills*, 6 Tex. Civ. App. 479, 25 S. W. 1055; *Parker v. Panhandle Nat. Bank*, 11 Tex. Civ. App. 702, 34 S. W. 196; *Ames Iron Works v. Chinn*, 15 Tex. Civ. App. 88, 38 S. W. 247; *Beverley v. Ellis*, 1 Rand. (Va.) 102; *Polk v. Cosgrove*, 4 Biss. (U. S.) 437, Fed. Cas. No. 11,248; *Riggs v. Boylan*, 4 Biss. (U. S.) 445, Fed. Cas. No. 11,822. See, also, *Brooke's Appeal*, 64 Pa. St. 127.

Accordingly, where the sum in a mortgage of one thousand dollars is recorded as one hundred, notice as to an encumbrance for the whole amount of the mortgage is held to be imparted: *Zear v. Boston etc. Trust Co.*, 2 Kan. App. 505, 43 Pac. 977. And where an instrument mentions two thousand acres "more or less" as being mortgaged, and it is registered as two hundred, notice of the correct amount is given, the number of acres followed by the phrase "more or less" being considered a very immaterial part of the description: *Kennedy v. Boykin*, 35 S. C. 61, 28 Am. St. Rep. 838, 14 S. E. 809. Nor does a mistake of the officer in recording a mortgage in the name of another impair its validity: *Seibold v. Rogers*, 110 Ala. 438, 18 South.

312; nor reversing the names of the mortgagor and mortgagee: *Townsend Brick etc. Co. v. Allen*, 9 Kan. App. 230, 59 Pac. 683.

c. Omission of the Seal.—A failure to copy or indicate a seal where the instrument is a specialty is not fatal: *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806; it being sufficient if it appear from the record that the instrument is under seal: *Smith v. Dall*, 13 Cal. 510; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Thorn v. Mayer*, 12 Misc. Rep. 487, 33 N. Y. Supp. 664.

II. Transcribing Instruments in the Wrong Book.

a. Two Views.—A common mistake made by recording officers is that of copying instruments left with them for registration in a wrong book; and the same division among the authorities is apparent as in regard to other errors in transcribing. Where a statute authorizes the keeping of two books, one for mortgages and one for absolute conveyances, recording a mortgage in the latter book is held to impart no notice: *Gillig v. Maass*, 28 N. Y. 191. See, also, *Fisher v. Tunward*, 25 La. Ann. 179. So, where a mortgage is entered in a book of assignments of mortgages it is invalid as against innocent purchasers and creditors: *Parsons v. Lent*, 34 N. J. Eq. 69; as is also the copying of a chattel mortgage in a book kept for real estate mortgages: *Knickerbocker Trust Co. v. Penn etc. Co. (N. J.)*, 55 Atl. 231, reversing 50 Atl. 459. The entry of a mortgage on a wrong page is also of no avail: *New York Life Ins. Co. v. White*, 17 N. Y. 469. In *Sawyer v. Adams*, 8 Vt. 172, 30 Am. Dec. 459, the clerk fraudulently copied a deed in a book which at the time had not been so used for over twelve years, and the names were not inserted in the alphabet. The court held that it was ineffectual to give notice, saying: "The deed was not recorded in a book kept for that purpose, and undoubtedly was kept from the alphabet for the very purpose of deception and concealment. We cannot consider that this deed was recorded according to the letter or spirit of our constitution and laws upon that subject; and unless we admit that a deed may be recorded in any place, where the town clerk may choose for the purpose of concealment and not for notice, and which he may call the records of a town, we must treat this record as a mere nullity."

Where the mere filing for record is held equivalent to actually recording an instrument, copying it in a wrong book is held to impart notice: *Durrence v. Northern Nat. Bank (Ga.)*, 43 S. E. 726; *Swepson v. Exchange etc. Bank*, 77 Tenn. (9 Lea) 713; and such is now the law in Pennsylvania: *Glading v. Frick*, 88 Pa. St. 460; *Clader v. Thomas*, 89 Pa. St. 343; *Paige v. Wheeler*, 92 Pa. St. 282; *Farabee v. McKerrihan*, 172 Pa. St. 234, 51 Am. St. Rep. 734, 33 Atl. 583; although it was formerly held in that state that recording a document in an inappropriate volume was defective: *Luch's Appeal*, 44 Pa. St. 519. In *Smith v. Smith*, 13 Ohio St. 532, a statute requiring a separate book entitled "record of mortgages" to be kept, was

considered as directory only. In Missouri a statute requires that mortgages of personalty shall be recorded in a series of books, distinct from that in which real estate conveyances are recorded. Construing this statute the court in *Hume Bank v. Hartsock*, 56 Mo. App. 291, held that it was substantially complied with if chattel mortgages were recorded in separate volumes, in which only personal property conveyances were recorded, although no different series was used from those for recording other conveyances.

b. Mixed Mortgages.—In the absence of statute, a mortgage of real and personal property may be recorded in a book of mortgages: *Armstrong v. Austin*, 45 S. C. 69, 22 S. E. 763. Where by statute chattel mortgages must be recorded in a special book, one conveying both realty and personalty is properly registered in the real property record, the statute referring to personal property mortgages alone: *Faxon v. Ridge*, 87 Mo. App. 299; *Anthony v. Butler*, 38 U. S. (13 Pet.) 423, construing a Rhode Island statute.

c. Absolute Deed Intended as Mortgage.—The question has also arisen as to which is the correct book where the instrument, though on its face is an absolute deed, is really intended as a mortgage. The courts are inclined to hold that it should be entered in the book of absolute conveyances, and that such recording would give notice of the mortgage: *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. 272. In *Haseltine v. Espey*, 13 Or. 301, 10 Pac. 423, the court said: "It seems to me that a deed absolute in terms should be recorded in the book of deeds, whatever might be the object or purpose for which it was executed; and that it would impart notice as effectually as if recorded in the book of mortgages. It could hardly be presumed that a party, desirous of ascertaining whether the title to real property was affected or not by an act of the claimant, would confine his search to the book of mortgages alone. If, however, the statute required such an instrument to be recorded there, it would have to be so recorded in order to constitute notice; but the statute only requires that separate books shall be provided for the recording of deeds and mortgages, in one of which deeds left with the clerk shall be recorded, and in the other mortgages. Unless, therefore, this provision must be construed so as to render it imperative upon the clerk to record in the book of mortgages every deed intended as such, irrespective of its terms, then the record of it in the book in which its terms indicate that it should be recorded would be sufficient. I do not believe that said provision of the statute should be so construed. I am of the opinion that an absolute deed, though intended as a mortgage, cannot properly be recorded in any other book than the book of deeds. Such an instrument would at law be a deed, whatever character equity might give it."

III. What Errors do not Avoid the Record.

a. **Slight and Immaterial.**—Slight and immaterial errors in transcribing an instrument, and not affecting or obscuring its sense are to be overlooked, and notice is held to be given: *Hughes v. Debnam*, 53 N. C. (8 Jones) 127; *Royster v. Lane*, 118 N. C. 156, 24 S. E. 796. So where "is" is omitted from the formula "as the fact is," such being prescribed by statute and correctly appearing in an earlier portion of the deed, the meaning is not obscured: *St. Croix etc. Co. v. Ritchie*, 73 Wis. 409, 41 N. W. 345, 1064; nor is the omission of the words "before me," in copying a certificate of acknowledgment, which should be "personally appeared before me" misleading: *Sis v. Boarman*, 11 App. D. C. 116. And where a chattel mortgage provided that if the property was sold the mortgagee might take possession, an error in the date of the note and when it was due was held immaterial: *Buck v. Young*, 1 Ind. App. 558, 27 N. E. 1106.

Ditto marks used in a notation of deeds are valid, and refer to the words immediately above them: *Hughes v. Powers*, 99 Tenn. 480, 42 S. W. 1. And the record of a document is not defective because part of it is printed instead of being written with pen and ink: *Maxwell v. Hartman*, 50 Wis. 660, 8 N. W. 103.

Where a misdescription misleads none of the parties, it cannot be taken advantage of: *Gaskill v. Badge*, 3 Lea (Tenn.), 144. And where a party has actual notice, no imperfection in the record can avail him, the purpose of the latter being only to give constructive notice and not needed where actual knowledge is had: *Hulsizer v. Opdyke* (N. J.), 13 Atl. 669; *Brown v. Kirkman*, 1 Ohio St. 116.

b. **Sufficient to Put a Searcher on Inquiry.**—Though there may be an error in the record, the authorities generally hold that if it is of such a character as to put a prudent and careful man on inquiry, which would result in disclosing the true facts, a searcher of the records must be held to notice: *Hollenbeck v. Woodford*, 13 Ind. App. 113, 41 N. E. 348; *Dargin v. Beeker*, 10 Iowa, 571. In *Merrick v. Wallace*, 19 Ill. 486, on the record the premises were described by an impossible sectional number, and the court held that "a party dealing with the grantor in such a deed would have his attention arrested by this singular description, and he would naturally be led to inquiry. The record afforded him abundant data, which properly used, and diligently inquired into, would inevitably have led him to the fact of the existence of this deed." And where the initial letters are the same and the spelling somewhat similar, it is held sufficient to give notice in *Muehlberger v. Schilling*, 3 N. Y. Supp. 705, 19 N. Y. St. Rep. 1.

The omission of the mortgagee's name has been considered sufficient to put a person on his guard: *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235, 6 N. W. 207, where it is said: "The defective record is of a mortgage which upon the face of it appears to be a mere nullity; for it is manifest that there can be no mortgage without a mortgagee. But the very nature of the defect in the instru-

ment is one that would instantly challenge attention, for no one for any conceivable purpose could be supposed to have an interest in placing such an instrument upon record. If actually defective as the record would indicate, no one could claim a lien by virtue of it; and if made dishonestly by the mortgagor, it would charge nothing, cover nothing and deceive nobody. The suggestion of mistake when the record is examined is inevitable and spontaneous." In *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523, however, it was held that no constructive notice was imparted where the mortgagor's signature was lacking in the record.

In *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47, in recording a chattel mortgage, the officer omitted the mortgagee's name in the affidavit, and the words "notary public" after the officer's name in the certificate. It was held that notice of some claim to the property was conveyed, and a person seeing it should have inquired whether or not the record spoke the truth.

See, also, cases cited herein under "Mistakes in Index Sufficient to Put Party on Inquiry," V, c.

IV. Indorsements upon Instruments of Time of Reception.

One of the common duties imposed upon recording officers is that of indorsing upon instruments left with them the date or time of filing. If the officer omits the indorsement, it is generally held not to prejudice the rights of the party filing it: *Holman v. Chevallier*, 14 Tex. 337. The filing of a chattel mortgage is complete, in contemplation of law, when it is delivered to, received by, and left with the proper officer, and a party's rights will not be affected by his failure to indorse thereon that it was filed in the town clerk's office: *Bailey v. Costello*, 94 Wis. 87, 68 N. W. 63. In *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568, the court held that the indorsement of the time of reception was one of the principal things to be done as affecting the validity of a chattel mortgage; but that certain entries to be made in the entry-book were only directory, and a failure to make them could not injure the mortgagee.

Where by statute, a town clerk upon receiving a chattel mortgage must note the time when it was received both in the book of records and on the mortgage, both these requirements must be observed for it to be considered as a record: *Handley v. Howe*, 22 Me. 560. If, however, the clerk omit to note the time of reception, the mortgage will take effect from the time of its actual registration. "The object to be accomplished was the recording of the mortgage, to give notoriety to the transaction. By the noting in the book and on the mortgage the time when the mortgage was received, it was to be considered as if it was recorded when left with the clerk. The subsequent recording had relation back to the time of noting, and the mortgage was to be considered as recorded at the time stated in the noting. The phrase 'and it shall be considered as recorded when left,

as aforesaid, with the clerk,' must mean, that the reception of it and the noting by the clerk should be considered as having the same effect as if the recording took place at the time of the delivery, and that it would be valid, although it was not recorded till a subsequent time. If it is recorded, that is a compliance with the law, and if it is wholly extended upon the record, and the time stated, before third persons acquire any right to the property, the interest of the mortgagee is secured. If a mortgagee would go back to an earlier time than that stated upon the record when his mortgage was recorded, and claim from the time when his mortgage was first left, he can only do so by showing the time noted in the book and upon the mortgage': *Holmes v. Sprowl*, 31 Me. 73. See, also, *McLarren v. Thompson*, 40 Me. 294. In *Monaghan v. Longfellow*, 81 Me. 298, 17 Atl. 74, the court held that if the mortgage remained on file, it was to be considered as recorded, though it was not spread on the records nor the time of reception noted on the record book, there being no need of noting the time on the record till the record was actually made.

V. Necessity for an Index.

a. Generally no Part of the Records.—The decided weight of authority is to the effect that an index to the records is no part of such records; that it is a convenience to searchers only; and that a failure on the part of the recording officer to enter the instrument left with him in the index or entering it incorrectly cannot operate to defeat or impair the title of the grantee or mortgagee: *Turner v. McFee*, 61 Ala. 468; *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 692; *Nichol v. Henry*, 89 Ind. 54; *Swan v. Vogel*, 31 La. Ann. 38; *Gorham v. Summers*, 25 Minn. 81; *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Jordan v. Hamilton County Bank*, 11 Neb. 499, 9 N. W. 654; *Chase v. Bennett*, 58 N. H. 428; *Dikeman v. Puckhafer*, 1 Abb. Pr., N. S., 32, 1 Daly, 489; *Mutual Life Ins. Co. v. Dake*, 1 Abb. N. C. 381, affirmed in 87 N. Y. 257; *Bedford v. Tupper*, 30 Hun, 174; *Davis v. Whitaker*, 114 N. C. 279, 41 Am. St. Rep. 793, 19 S. E. 699; *Green v. Garrington*, 16 Ohio St. 548, 91 Am. Dec. 103; *Board of Commrs. v. Babcock*, 5 Or. 472; *Schell v. Stein*, 76 Pa. St. 398, 18 Am. Rep. 416; *Wood's Appeal*, 82 Pa. St. 116; *Stockwell v. McHenry*, 107 Pa. St. 237, 52 Am. Rep. 475; *Armstrong v. Austin*, 45 S. C. 69, 22 S. E. 763; *Maxwell v. Stuart*, 99 Tenn. 409, 42 S. W. 34; *Curtis v. Lyman*, 24 Vt. 338, 58 Am. Dec. 174; *Barrett v. Prentiss*, 57 Vt. 297; *Hampton Lumber Co. v. Ward*, 95 Fed. 3. See, also, *Lincoln Sav. Assn. v. Hass*, 10 Neb. 581, 7 N. W. 327.

b. The Minority Rule.—The minority rule holds that an index is more than a convenience; that without it the records are too cumbersome to be of practical use; and that for the purpose of giving constructive notice, the index is as important as the record-books themselves: *Barney v. McCarty*, 15 Iowa, 510, 83 Am. Dec. 427; *Koch v.*

West, post, page 394, 118 Iowa, 468, 92 N. W. 663; Elliott v. Harris, 81 Ky. 470; Shove v. Larsen, 22 Wis. 142.

This latter line of cases holds that a searcher need not look beyond the index; so where, in the index "Freeman" was written for "Furman," no notice was held to be imparted: Howe v. Thayer, 49 Iowa, 154. See, also, Peters v. Ham, 62 Iowa, 656, 18 N. W. 296. And where a mortgage conveying two tracts of land is given, and only one of the tracts is entered in the column for descriptions, as to the other no notice is given: Noyes v. Horr, 13 Iowa, 570. Both husband and wife's names need not be mentioned in the index where the property is a homestead, any more than in a conveyance of any other real estate: Hodgson v. Lovell, 25 Iowa, 97, 95 Am. Dec. 775.

c. Mistakes in Index Sufficient to Put Party on Inquiry.—The rule before mentioned applies also to indexes, and if enough is therein set forth to put a careful or prudent examiner upon inquiry, which would result in revealing the true facts, he will be held to notice: Jones v. Berkshire, 15 Iowa, 248, 83 Am. Dec. 412; Disque v. Wright, 49 Iowa, 538; Malbon v. Grow, 15 Wash. 301, 46 Pac. 330; American Emigrant Co. v. Call, 22 Fed. 765.

d. Index and Record Book to be Taken Together.—The index and the record book are to be taken together. In Barney v. Little, 15 Iowa, 527 in the index an instrument, entered on page 546, was set forth as on page 596, the description otherwise being good. Constructive notice was held to be given, the court saying: "The prior decisions of this court have settled that, while the index, which serves, so to speak, as a finger-board to direct the inquirer, must not mislead him by giving a totally wrong description of the lands: Scoles v. Wilsey, 11 Iowa, 261; yet it is not necessarily and essentially a prerequisite to a valid registration that the index should contain a description of the lands conveyed. It is sufficient if it points to the record with reasonable certainty: Bostwick v. Powers, 12 Iowa, 456; Calvin v. Bowman, 10 Iowa, 529.

"If the grantor's and grantee's names are given in the index, with the book and page where the instrument is recorded, and if the instrument is there really recorded, we believe that this, so far as the object of the recording act is concerned is a substantial, though it may not be in all respects, as to the index-book, a literal compliance with the law. For the record-book and the index-book are not to be considered as detached and independent books, but related and connected ones, and a party (assuming it to be an instrument which the law authorizes and requires to be recorded) is, where the index makes the requisite reference, affected with notice of any facts which either book contains with respect to the title of his proposed grantor.

"Were it not for the mispaging in the index of the plaintiff's mortgage, we are all agreed that the requirements of the law were, in substance, observed. . . . The court cannot avoid the conclu-

sion that if the appellants, in the case under consideration, had made an ordinarily diligent, skillful and careful examination of the records, the mortgage in question would have been discovered to them."

Where, therefore, in place of describing the land in the index, the words "see record" are inserted, sufficient notice is given: *White v. Hampton*, 13 Iowa, 259.

In Wisconsin the index is notice of the entries therein from their dates, and until the instrument is registered in full, and where there is a mistake in one of these, it is cured by a correct copy in the other. So the omission to enter a description of the land in the index is cured by transcribing the deed at length on the records: *St. Croix etc. Co. v. Ritchie*, 73 Wis. 409, 41 N. W. 345, 1064; and in the absence of proof it will be presumed that an entry in the general index and the actual recording of the instrument were simultaneous acts, the record being deemed complete from the time the instrument is transcribed: *Lane v. Duchac*, 73 Wis. 646, 41 N. W. 962. Where, however, the index upon its face bears conclusive evidence that it was not made at its date, as where different ink is used and it is interlined, it will not operate as notice: *Hay v. Hill*, 24 Wis. 235. While a defect in the index may be cured by the record, and vice versa, if there are some in the one which are not supplied by the other, it is of no avail as notice: *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772. A custom of the recorder not to enter the instruments in the index till next morning cannot affect the rights of third person, a statute providing they shall become notice from the time of entry therein: *Hibbard v. Zenor*, 75 Iowa, 471, 9 Am. St. Rep. 497, 39 N. W. 714.

e. **What is a Suitable Index.**—Where by law a suitable index is required to be kept, all that is needed is that it be such as to inform the person examining the title of particular property, where such title can be found: *Smith v. Royalton*, 53 Vt. 604. Where a statute provides for the keeping of a separate index for three different sets of record-books—one for deeds, another for mortgages, and the third for all other instruments—the officer is not required to keep a separate index for each class of instruments under the last head; nor is it invalid because bound in the same volume with one of the books of miscellaneous records to which it referred: *Benton v. Nicholl*, 24 Minn. 221.

McDONALD v. NUGEN.

[118 Iowa, 512, 92 N. W. 675.]

JUDGMENTS Against Joint Tort-feasors—Payment as Bar.—

The voluntary payment to the clerk of court of a judgment against one of two joint tort-feasors sued separately, while it remains unaccepted by the plaintiff, does not bar an action against the other tort-feasor. (p. 407.)

Plaintiff sued separately and recovered a judgment against one joint tort-feasor, which was voluntarily paid to the clerk of the court by the other tort-feasor without authority from the plaintiff to such clerk to accept payment for him, nor did he accept such payment. The joint tort-feasor paying such judgment pleaded such payment as a bar to plaintiff's action against him. Judgment for plaintiff and the defendant appealed.

Palmer & Kopp, for the appellant.

F. W. Walters, Babb & Babb and Seerley & Clark, for the appellee.

513 SHERWIN, J. The only question for determination is whether the voluntary and unsolicited payment of the judgment against the defendant's joint wrongdoer was such a satisfaction for the plaintiff's injury as to bar this action. It is the settled law of this state, as it is in most of the states, that, if several persons jointly commit a tort, the plaintiff may sue for his injury jointly or separately, as he may elect. The principle upon which the rule is based is that a tort is, in its nature, the separate and independent act of each wrongdoer, and because thereof each is liable for the entire wrong done: *Turner v. Hitchcock*, 20 Iowa, 310; *Cooley on Torts*, 138. It is also the universal rule that the plaintiff can enforce only one satisfaction for the same injury: *Metz v. Soule*, 40 Iowa, 236.

This brings us to the question of what is the legal satisfaction contemplated by the rule above noticed. The authorities generally hold that the plaintiff may prosecute separate actions against joint wrongdoers to final judgments if in the meantime he has not received satisfaction for the injury from any source (*Cooley on Torts*, 138), and that he may elect which judgment he will enforce for his satisfaction: *Putney v. O'Brien*, 53 Iowa, 117, 4 N. W. 891; *Cooley on Torts*, 138. Following these rules to their final analysis, it is evident that the satisfaction which the law says shall bar further recovery must be such as shall be

voluntarily accepted by the plaintiff. Otherwise, one joint wrongdoer, or all of them acting in concert through the ⁵¹⁴ one, or the clerk, might in fact exercise the election which the law says the plaintiff has the right to make, and thus defeat the very object of the rule giving the plaintiff the right to maintain separate actions, and to prosecute them to final judgments: *Blann v. Crocheron*, 20 Ala. 320.

It is well said in the last case cited: "Were the law otherwise, it would enable joint trespassers who were sued separately to hasten the trial of the one lesser guilty among them, and, by satisfying in the clerk's office the damages against him, to free themselves from all responsibility for their own greater guilt. In fact, it would change the rule which gives the right of election in such actions to the plaintiff, and bestow it upon the defendant. To determine the plaintiff's right to elect, he must act." In *Cooley on Torts*, 138, it is said: But as the plaintiff "can claim or enforce only one satisfaction for the same injury, he must elect against which of the several he will proceed to execution for the satisfaction of his damages. If the several assessments vary in amounts, he may elect to take the larger sum, or, if the defendants be not all solvent, he may elect to proceed against the solvent party." The same principle is recognized in *United Society of Shakers v. Underwood*, 11 Bush, 265, 21 Am. Rep. 214. Nor does the defendant suffer any hardship by thus denying him the privilege of making the election for the plaintiff. All that he may demand is that but one compensation shall be received for the injury, and this such as the plaintiff shall elect to receive, and from the wrongdoer from whom he shall elect to receive it.

In a criminal prosecution for a joint wrong, the state may compel each wrongdoer to pay a penalty for his act, for it is as much offended against whether the crime is committed by one or by a dozen; and, in our judgment, one who engages in a joint civil trespass has no special claim to consideration. The limit to the plaintiff's recovery is fixed by his individual right to full compensation for ⁵¹⁵ his injury, and for nothing more, and is not based upon consideration for the defendant. It is true that the payment of a judgment to the clerk of the court in which it is rendered is authorized, and that such payment will be a satisfaction thereof, so far as the judgment debtor is concerned; but there is a wide difference between the satisfaction of a judgment of record, which operates to bar further proceedings against the judgment debtor, and the accord and satisfaction which will bar proceedings against his joint wrongdoer.

In the first case the defendant has done no more than the law requires him to do, though it may have been done without the solicitation or consent of the plaintiff; nor was such consent on the part of the plaintiff necessary to the protection of the defendant. In the latter case the satisfaction must be such as is acceptable to the plaintiff as the final termination of his right of action against all of the joint wrongdoers, and it must of necessity be a satisfaction to which he has agreed, either expressly or impliedly, because an accord and satisfaction can never be other than mutual. In other words, he cannot be deprived of his right of election against the wrongdoers, except on account of some act of his own: 1 Cycl. Law & Proc. 311. The case of *Bryant v. Reed*, 34 Neb. 720, 52 N. W. 694, cited and relied upon by the appellant, does not, in our judgment, hold contrary to the views herein expressed, for the precise question under consideration here does not seem to have been discussed in that case.

The judgment is right, on principle and authority, and it is affirmed.

The Principal Case is cited and considered with other decisions involving similar questions in the monographic note to *Abb v. Northern Pac. Ry. Co.*, 92 Am. St. Rep. 885, on the release of one joint tort-feasor as affecting the liability of the others.

TOLLERTON & STETSON COMPANY v. SKELTON.

[118 Iowa, 543, 92 N. W. 652.]

EXECUTIONS—Levy upon Mortgaged Chattels.—A statute requiring payment or security to the mortgagee upon a levy made upon mortgaged chattels is for the benefit of the mortgagee alone, and not for the benefit of the mortgagor who has no right to interfere with the proceeding. The mortgagee may waive the right to payment of or security for, the mortgage debt and assent to the levy which is valid as against a subsequently executed mortgage of the same chattels. (p. 411.)

J. E. Jennings executed and delivered a chattel mortgage covering his stock of goods and store fixtures to the Valley Bank to secure an indebtedness due from him to such bank. Said mortgage was duly recorded prior to February 5, 1900, and on that date the Paxton & Gallagher Company commenced an action against Jennings and caused a writ of attachment to issue

which was levied upon such goods and fixtures. On the same day but subsequent to such levy, and while the property was in the custody of the defendant sheriff, Jennings executed and delivered to the Tollerton & Stetson Company, the plaintiff herein, a mortgage on the same property and such mortgage was duly recorded the same day. The plaintiff, at that time, had knowledge of the prior mortgage and of the levy of the attachment. The sheriff held the said property in his possession for more than ten days after making the levy, without payment of the mortgage to the mortgagee or security being given therefor. On February 28, 1900, the Tollerton & Stetson Company made a written demand upon the sheriff for the release of said property. This demand was ignored and subsequently the Paxton & Gallagher Company obtained judgment against Jennings, caused an execution to issue thereon, under which the sheriff sold sufficient of the goods levied upon to satisfy such judgment. The remainder of the goods and fixtures was taken possession of by the Valley Bank under its mortgage and sold by it to satisfy its mortgage debt.

The goods sold by the sheriff under execution were of the value of two hundred dollars, and this action was brought to recover that amount. Judgment for the defendant and plaintiff appeals. Section 3979 of the Code of Iowa mentioned in the opinion reads as follows:

"Sec. 3979. Mortgaged personal property, not exempt from execution, may be taken on attachment or execution issued against the mortgagor, if the officer, or the attachment or execution creditor, within ten days after such levy, shall pay to the holder of the mortgage the amount of the mortgage debt and interest accrued, or deposit the same with the clerk of the district court of the county from which the attachment or execution issued, for the use of the holder of the mortgage, or secure the same as in this chapter provided."

C. W. Kellogg, for the appellant.

J. S. Dewell, for the appellee.

544 BISHOP, J. We have set out the facts fully in the foregoing statement, because, as we think, the case is ruled by *Wilson v. Felthouse*, 90 Iowa, 315, 57 N. W. 878, and *Clark v. Patton*, 92 Iowa, 247, 60 N. W. 533. In the *Wilson* case the act of the twenty-first general assembly—now appearing in the Code as section 3979 et seq.—relating to levies upon mortgaged chat-

tels, was directly under consideration. There the mortgagor, subsequent to a levy of attachment upon the mortgaged goods, made a general assignment for the benefit of creditors, and that suit was brought by the assignee against the attaching creditors. Here the suit is by a mortgagee whose mortgage was executed subsequent to the levy of attachment, and in that respect is identical ⁵⁴⁵ with *Clark v. Patton*, 92 Iowa, 247, 60 N. W. 533. In each instance the right to recover is made to depend wholly upon an act done by the mortgagor, in respect to the mortgaged property, subsequent in point of time to the levy. The same principle is applicable to each of the cases. In the *Wilson* case we said: "There is not one word in the whole act for the protection of the mortgagor. We have no doubt that the mortgagee may waive any right to a deposit of the amount secured by the mortgage." And again, referring to the statute: "Its whole purpose is to authorize an attachment or execution in such cases by paying or securing the mortgagee. It contains no provision authorizing the mortgagor to interfere with the proceeding. The case is, in effect, precisely in the same attitude that it would be if the mortgagee had expressly waived his right to payment of the mortgage, and assenting to the levy of an attachment on the property." The conclusion follows irresistibly that the provisions of the statute requiring payment of or security for the mortgage debt are for the benefit of the mortgagee, and him alone. Although the question was not directly involved in the case, the same thought is expressed in *Collins v. Gregg*, 109 Iowa, 506, 80 N. W. 562.

There was no error in entering judgment for the defendant in this case.

Affirmed.

Mortgaged Personalty remaining in the possession of the mortgagor is subject to execution against him, but not when it has been surrendered to the mortgagee: *Second Nat. Bank v. Gilbert*, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306, and cases cited in the cross-reference note thereto; *Newman v. Mantle*, 109 Ky. 292, 95 Am. St. Rep. 372, 58 S. W. 783.

ANDREWS v. MARSHALL CREAMERY COMPANY.

[118 Iowa, 595, 92 N. W. 706.]

LANDLORD AND TENANT—Option to Extend Term.—If a lease provides that the tenant may have, at his option, an extension, for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term constitutes an election to hold for the additional or extended term. (p. 413.)

LANDLORD AND TENANT—Distinction Between "Privilege of Extension" and "Right of Renewal."—There is a broad distinction between a right of extension for a specified time and a right of renewal. Under the first provision a mere holding over constitutes an election to hold for the extended term, but a mere holding over is not a sufficient election to renew the lease. To constitute a renewal, some additional affirmative act or acts must be shown to establish the exercise of the right. (pp. 413, 414.)

LANDLORD AND TENANT—Right to Renew Lease—Holding Over.—The mere act of a tenant in holding over after the expiration of his term is not sufficient, without proof of some other affirmative act on his part, to show an election to renew the lease for an additional term under a stipulation in the lease giving the privilege of such renewal. (p. 415.)

LANDLORD AND TENANT—Holding Over—Right of Renewal—Tenant at Will.—A tenant merely holding over after the expiration of his lease containing a clause giving him a right of renewal, without doing any act evidencing an intention to renew the lease, is a mere tenant at will. (p. 415.)

LANDLORD AND TENANT—Renewal of Lease by Implication.—If a tenant holds over after the expiration of his term under a lease giving him the right of renewal, and requests a renewal of the lease, and is assured by the authorized agent of the lessor that such renewal will be granted, this is a sufficient election to exercise the option to renew the lease as will bind the tenant. (p. 416.)

Meeker & Meeker, for the appellants.

Binford & Snelling and Boardman, Aldrich & Lawrence, for the appellee.

596 **McCLAIN, J.** The lease of the premises, executed in April, 1898, was for the term of one year from May 2, 1898, with a yearly rental of six hundred dollars, payable in monthly payments in advance, "with the privilege of renewal for four years longer on the same terms." It was further stipulated therein that, in case immediate possession was not given at the termination of the term, the lessees should pay to the lessor "ten dollars per day for each and every day said premises shall be withheld." And the lessees further agreed "to surrender said premises at the end of the lease, or sooner determination thereof, in as good condition as reasonable use thereof will permit,

damage by the elements excepted." After the expiration of the one year term defendants continued to occupy the premises and pay rent at the rate stipulated in the lease for several months, when they gave to the lessor notice that they would terminate their occupancy of the premises and surrender possession at the expiration of thirty days from that time. The question is whether defendants became tenants for a four year ⁵⁹⁷ term, after the expiration of the one year term provided for in the lease, under the provision with reference to renewal, or whether they became tenants at will at the expiration of the one year term, and had the right to terminate such tenancy on giving thirty days' notice.

There seems to be no doubt under the authorities that, where a lease provides that the tenant may have, at his option, an extension for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term will constitute an election to hold for the additional or extended term, and the tenant, after holding over beyond the first term without any new arrangement, is bound for the additional or extended term as fully and completely as though that term had been originally included in the lease when executed: *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; *Terstegge v. First German Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Montgomery v. Board of Commrs.*, 76 Ind. 362, 40 Am. Rep. 250; *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545; *Harding v. Seeley*, 148 Pa. St. 20, 23 Atl. 1118; *Mershon v. Williams*, 62 N. J. L. 779, 42 Atl. 778; *Clarke v. Merrill*, 51 N. H. 415. According to this view, the continuance in possession is sufficient proof of an election to enjoy the privilege of extension provided for: *Kramer v. Cook*, 7 Gray, 550; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623; *Holley v. Young*, 66 Me. 520. In well-reasoned cases in Massachusetts the view is expressed that holding over is merely evidence of an intention to occupy under the privilege of an extension, which may be overcome by evidence of a contrary intention: *Jones v. Tilton*, 139 Mass. 418, 1 N. E. 741; *Kimball v. Cross*, 136 Mass. 300.

There is good reason, however, supported by authority, for a distinction between a privilege of an extension ⁵⁹⁸ and a right to renew. The extended term or additional term is one provided for in the lease itself, and the mere enjoyment of the privilege by continuing in possession is enough to bring the extended occupancy within the original contract. But an agreement for

an option of renewal would seem to imply that the parties contemplated some affirmative act by way of the creation of an additional term. It is no doubt true that this affirmative act may be something different from, and less than, the execution of a new lease; for, when the tenant has indicated affirmatively the election to avail himself of the privilege of renewal, he has done all that is necessary to create a renewal, for the conditions under which the new term is to be enjoyed will be the same as those under which the first term was enjoyed, save as to the condition which provides for the renewal: *Brand v. Frumveller*, 32 Mich. 215; *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612; *Orton v. Noonan*, 27 Wis. 272; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776. A covenant to renew gives a privilege to the tenant, but is nevertheless an executory contract, and, until the tenant has exercised the privilege, he cannot be held for the additional term: *Swank v. St. Paul etc. Ry. Co.*, 61 Minn. 423, 63 N. W. 1088; *Schwank v. St. Paul etc. Ry. Co.*, 72 Minn. 380, 75 N. W. 594. There is authority for the view that the mere holding over is sufficient evidence of an election to renew, even where that is the privilege given in the lease: *Insurance etc. Bldg. Co. v. National Bank of Missouri*, 71 Mo. 58; *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92; *Clarke v. Merrill*, 51 N. H. 415; *McBrier v. Marshall*, 126 Pa. St. 390, 17 Atl. 647. But with better reason, as we think, it has been held in other cases, after a full consideration of the question and the authorities bearing upon it, that the act of holding over is not sufficient to show an affirmative election to ⁵⁹⁹ renew the lease for an additional term under a stipulation giving the privilege of such renewal: *Thiebaud v. First Nat. Bank*, 42 Ind. 212; *Terstegge v. First German Mut. Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Renoud v. Daskam*, 34 Conn. 512; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776. The arguments in favor of the doctrine supported by the cases last cited seem to us to be controlling. The covenant of renewal itself implies the creation of a new term, and some exercise of the right of election to assume the obligations involved therein should appear: *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414; *Bradford v. Patten*, 108 Mass. 153.

The distinction between the privilege of extension, involving the mere election to treat the original lease as for a longer term than that agreed upon at its execution, and the privilege of renewal, involving the creation of another term distinct from that provided for in the lease as executed, is implied in the language

selected to express the intention of the parties. Where the stipulation is for privilege of renewal, the situation at the end of the first term is this: The tenant may, if he sees fit, by any appropriate act indicating his intention to do so, and before the privilege has expired by the expiration of the term, bind himself to a new lease, the terms and conditions of which are expressed in the first lease. But, on the other hand, he may, if he sees fit, become a tenant holding over after the expiration of his term; that is, a tenant at will under the provisions of our statute (Code, sec. 2991; *O'Brien v. Troxel*, 76 Iowa, 760, 40 N. W. 704; *German State Bank v. Herron*, 111 Iowa, 25, 82 N. W. 430); or, in some states, a tenant from year to year, and bound to continue in possession for an additional term, as fixed by law (*Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, 31 N. E. 94); and by thus holding over he creates a new tenancy for an additional term, or at will, as the case may be, which he can only terminate as provided by law: *Baltimore etc. R. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344; *Gladwell v. Holcomb*, 60 Ohio St. 427, 600 71 Am. St. Rep. 724, 54 N. E. 473. It is true, the landlord is not bound in this state to accept him as a tenant at will, but may at once proceed to recover possession of the premises. But, if the landlord allows him to remain for thirty days, then a tenancy at will is created for the occupancy of the premises on the terms of the former lease, which can be terminated only by notice, as provided by statute: Code, sec. 2991; *City of Dubuque v. Miller*, 11 Iowa, 583; *McClelland v. Wiggins*, 109 Iowa, 673, 81 N. W. 156; *Shuver v. Klinkenberg*, 67 Iowa, 544, 25 N. W. 770.

Now, it seems to us more reasonable to assume that the tenant holding over after the expiration of his term, without more, elects to become a tenant at will, provided his landlord allows him to remain in possession, than that he thereby elects to bind himself for an additional term, which he might have availed himself of by acting under the provisions of his lease, but which he has in fact indicated no intention to claim or become bound for.

As the holding over alone was not sufficient to establish an exercise of the option to renew, it becomes necessary to consider whether there was other evidence, which, in addition to that fact, was sufficient to show such election. It appears that less than two months prior to the expiration of the first term the lessor asked one Collyer, the agent in charge of the premises for defendants, who were nonresidents, whether defendants intended

to remain after the expiration of the term, and was given assurance in a general way that such was their purpose. On this assurance some improvements were made, which the landlord was under no obligation to make. A few days after the expiration of the first term the lessor asked Collyer to execute for defendants a written renewal of the lease. Collyer claimed he had no authority to execute such an instrument, but promised that within a few days he would present it for signature to the officers ⁶⁰¹ of the defendant company in Chicago, where they resided, at the same time assuring lessor that he could have a written renewal if he wanted it. Afterward Collyer told lessor that he had omitted to call the attention of the officers to the matter, and assured lessor that defendants would stay, and needed no renewal. It is to be borne in mind that in all of the conversations between lessor and Collyer the evident purpose of lessor, as it must have been understood by Collyer, was to ascertain whether defendants were intending to elect or had elected to renew, and that he had the right to put them out of possession at the expiration of the term, or afterward to terminate their possession on thirty days' notice, in the absence of a renewal, and the evident intention of Collyer was to induce lessor to allow the possession to continue. We have no doubt, under the evidence of Collyer's authority to bind the defendants by a renewal, no written agreement to that effect being necessary, nor of the purpose of Collyer to induce lessor to allow defendants to remain in possession under the belief that they were so remaining in pursuance of the renewal privilege. This was enough to bind defendants.

Our conclusion is that the option to renew was exercised, and that defendants became bound for the additional term provided for in the lease, and the decree of the lower court is affirmed.

If a Tenant, under a Lease for a definite period, with the privilege of a certain number of years more, holds over, he is bound for the further term: *Montgomery v. Board of Commissioners*, 76 Ind. 362, 40 Am. Rep. 250; *Terstegge v. First German Benevolent Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Delaskman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392. And the general rule as laid down by the authorities seems to be that if a tenant for one or more years holds over at the expiration of his term, the landlord may either treat him as a trespasser or as a tenant for another year upon the terms of the prior lease as far as applicable: See *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724, 54 N. E. 473; monographic notes to *Blumenberg v. Myres*, 91 Am. Dec. 563-566; *Herter v. Mullen*, 70 Am. St. Rep. 533-538. This rule may be relaxed, however, when the tenant is detained by stress of circumstances: *Herter v. Mullen*, 159 N. Y. 28, 70 Am. St. Rep. 517, 53 N. E. 700. Compare *Mason v. Wierengo*, 113 Mich. 151, 67 Am. St. Rep. 461, 71 N. W. 489.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

GLOBE BUILDING AND LOAN COMPANY v. WOOD.

[110 Ky. 4, 60 S. W. 858.]

BUILDING AND LOAN ASSOCIATION—Assignment for Creditors.—Under proper circumstances, a building and loan company may liquidate its business by the agency of a voluntary assignment. (p. 420.)

BUILDING AND LOAN ASSOCIATION—Assignment for Creditors.—In determining whether a building and loan association is insolvent so as to justify its making an assignment for the benefit of creditors, a different rule is applicable than in the case of an ordinary corporation whose business is almost entirely with outsiders. (p. 421.)

BUILDING AND LOAN ASSOCIATION—Assignment for Creditors.—If the objects of a building and loan association are frustrated and it cannot meet its obligations, there being a panic among the stockholders, a scramble among the nonborrowers to withdraw, and an inability of the company to pay withdrawing members or obtain funds to lend to stockholders and therefore to mature its stock, the directory may make an assignment for the benefit of creditors. (p. 422.)

BUILDING AND LOAN ASSOCIATION—Transfer by Member of Mortgaged Land.—If a member of a building and loan association sells the land which he has mortgaged to the company to secure a loan and thereafter the purchaser makes the payments on the stock, it is immaterial so far as concerns the lien of the company, whether there is an actual transfer to him of the stock. (p. 422.)

BUILDING AND LOAN ASSOCIATION—Credit for Dues Paid.—When a borrowing member of a building and loan association is sued by its assignee in insolvency, he is entitled to no credit on his loan for dues paid and properly carried to the stock account, except when the court conducting the administration is satisfied that the entire amount of the stock account will not be needed to pay the expenses, losses, and costs of administration. (p. 423.)

Kohn, Baird & Spindle, James P. Gregory and Ben W. Hall, for the appellant.

Ed. C. O'Rear and Robert H. Winn, for the appellee.

⁸ DuRELLE, J. Appellee Wood became a member of the Globe Building and Loan Company by subscribing for twelve shares of stock, and in October, 1894, borrowed twelve hundred dollars, for which he executed his note, and to secure the payment thereof pledged the shares of stock, and executed a mortgage to the company upon a lot of land in Mt. Sterling, the mortgage being duly recorded. In March, 1895, Wood sold the property to appellee O'Rear, the consideration recited being "that the second party pay to the Globe Building and Loan Company of Louisville, Kentucky, the loan of twelve hundred dollars the first party owes to said company, less the sums heretofore paid by said first party, which loan the first party has the option to pay in monthly payments, and which loan is secured by a mortgage on the lot hereinafter described, and said second party assumes and agrees to pay to W. H. Holt two notes of one hundred and forty-four dollars each, and the interest thereon, which notes are secured by a lien on said lot and other valuable considerations." There appears to have been no formal transfer from Wood to O'Rear of the stock in the company, but on April 15, 1895, appellee O'Rear addressed to the company the following letter: "Dear Sirs: I will make the payments, so long as I own the property, of the nineteen dollars and twenty cents per month on the J. C. Wood stock, on which he has the loan secured by mortgage ⁹ on property sold me, but for the month of February I do not owe it. Mr. Wood was to pay that. He is also to pay the transfer fee. I haven't the pass-book. Please have him attend to that. He being your agent, you, of course, have it in your power to fully protect yourselves in this matter." On the 5th of April, 1895, Wood wrote the company, saying: "Inclosed you will find my report for March, and ch. to cover same. This makes a complete settlement of all I owe as your collector, and I trust you will find it satisfactory. Rspt., John C. Wood. P. S. I have sold my house on which you hold a mortgage to Judge Ed. C. O'Rear, of this place. You may look to him for all future payments. Please have the loan transferred on your books." On July 1, 1897, the company executed a deed of assignment to appellant Eubank, who accepted the trust, and has since been administering the estate in liquidation. Appellee O'Rear sold the property to appellee Bright, and in

January, 1899, the appellant filed his petition seeking the recovery of nine hundred and ninety-nine dollars and ninety-two cents, asserting a mortgage lien to secure the payment thereof upon the lot of land, and praying a sale to pay the indebtedness. The appellees Wood and O'Rear filed a joint answer, admitting the execution of the note and mortgage by Wood, and his subscription for the stock, but denying "the right or authority of the plaintiff to execute a deed of assignment," and, upon information and belief, denying that the company "is insolvent or ever was." They also denied that there was any transfer of the stock from Wood to O'Rear, or any acceptance of such stock by the latter. They aver, in substance, that upon the sale of the property appellee O'Rear assumed and agreed to pay the company twelve hundred dollars with six per cent from the date of the deed until paid, and that the company accepted this undertaking ¹⁰ in lieu of the debt on the property, and exonerated Wood from further liability. The answer was accompanied with a tender of payment of the amount of the debt, after crediting all payments made by either Wood or O'Rear upon the note, without regard to whether any part of such payments had been taken by the company as payments of dues upon stock by either party. By reply, the affirmative averments of the answer were put in issue.

The trial court seems to have allowed credits for all sums paid by either of the appellees named, and appellant claims that this was error, in so far as credit was allowed for the sum of seven dollars and twenty cents per month which the company carried to its account of dues upon the stock, and this stock account, it is insisted, is to be kept inviolate for the purpose of paying the expenses of the company, the losses incurred, and the cost of liquidation, except in so far as the court under whose care the liquidation is being conducted may be able to determine what proportion, if any, of said stock account will certainly not be needed for those purposes. No question of fact is presented. The controversy is entirely upon questions of law, and on the conclusions which are to be drawn from the facts shown.

Waiving the question whether the issue is sufficiently presented as to the power of the company to make an assignment, and its insolvency as a basis to justify making the assignment, there would seem to be little doubt that, under proper circumstances, a building and loan company can, under the law of Kentucky, liquidate its business by the agency of a voluntary assignment. We find nothing in the statutory provisions as to building and

loan companies which seems, either directly or by implication, to prohibit their making voluntary deeds of assignment. On the contrary, under section 855 of the Kentucky ¹¹ Statutes, they are invested "with all the powers and privileges, liabilities and restrictions, granted to, or imposed upon, corporations generally under the first article of this chapter." It is true that there seems to be no express provision in the corporation law authorizing corporations to make voluntary assignments, but the right of corporations generally to make such assignments has been uniformly recognized in this state, and in section 74 et seq. of the Kentucky Statutes, the right of all debtors, whether natural or artificial persons, to make such assignments is recognized, subject only to the exception (section 75) that the deed can be set aside when the assignor is solvent, and has made the assignment to cheat, hinder and delay creditors. The right of such company to make an assignment has been recognized in various states: *Christian's Appeal*, 102 Pa. St. 189; *Harvey v. Cubbedge*, 75 Ga. 792; *Peter's Bldg. etc. Assn. v. Jaecksch*, 51 Md. 198, 49 Cent. L. J. 459; 5 *Thompson on Corporations*, sec. 5467. And, while this question seems not heretofore to have been directly presented in this state, the right has been recognized in *Reddick v. United States Bldg. etc. Assn.*, 106 Ky. 94, 49 S. W. 1075; *Sumrall v. Commercial Bldg. etc. Assn.*, 106 Ky. 260, 90 Am. St. Rep. 223, 50 S. W. 69, and *Forwood v. Eubank*, 106 Ky. 291, 50 S. W. 255.

When we come to consider whether a building and loan association is so insolvent as to justify making an assignment for the benefit of its creditors, it is manifest that we must apply a somewhat different rule from that applicable to an ordinary corporation whose business is almost entirely with outsiders. In one sense a building and loan company has little, if any, debts owing to outsiders. If we are restrained from considering any obligation of the company except such as are due to outsiders, it is scarcely possible that such a company could become insolvent. But it does incur obligations to its stockholders, the ¹² maturity of which can be precipitated at the option of the stockholders by simply giving notice in a book provided for the purpose: Ky. Stats., sec. 860. It is true that that section provides that "at no time shall more than one-half the funds in the treasury be applicable, without the consent of the directors, to the demands of the withdrawing members." But that provision does not prevent such demands being due, and, if it did operate to postpone the time of maturity, would not operate to prevent such demand,

constituting a liability. An attempt on the part of the company to avail itself of this provision, in order to postpone the satisfaction of stockholders who might give notice of withdrawal, would have precipitated a panic among the stockholders, with results far more disastrous than could be produced by the assignment.

There is no analogy, as is suggested by appellees, between the usury contracted for on loans by building and loan associations and that which is collected by banks. The banks deal in short-time loans, with a limited class of people engaged in business, and who depend on the banks for the accommodation necessary to carry it on. A refusal to pay the current rate of usury demanded by the banks would be an effectual bar to further accommodation, and in a vast majority of cases would necessitate the withdrawal of the customer from business. The stockholders of a building and loan company who borrow from the funds of the company have, as a rule, but one transaction with the company. When, from any cause, the contract fails to be carried out, there is no expectation of future favor, and consequently no fear of future denial. It may be safely assumed that, after the delivery of the opinion in the Simpson Case, 41 S. W. 570, there would not be one case in a hundred thousand foreclosure ¹³ suits in which the defenses which were sustained by that opinion would not be taken advantage of. It was therefore proper for the company to charge off from the account of its assets the usury which had been embraced in them, and which was uncollectible under the Simpson opinion.

It appears that, in the brief period before the assignment, notice had been given for the withdrawal of stock to the withdrawal value of ninety thousand dollars, fifty thousand dollars of which was collectible on the date of the assignment, unless advantage were taken of the provision above referred to in section 860, which would undoubtedly have increased the haste of the stockholders to withdraw. There was a panic among the stockholders, and a scramble among the nonborrowers to withdraw from the association. The treasury was practically empty. Dividends had been declared upon the assumed profits of the concern, which were in a great measure based upon the usury which the decision in the Simpson case put an end to. In the case of nonborrowing members, these profits had been declared from year to year, to hasten the maturity of the stock, and had been withdrawn, or were being sought to be withdrawn, by the withdrawing members. In the case of borrowing members, these assumed profits had also been declared, and had been carried

to the credit of stockholders to aid in maturing stock, and in thereby canceling the indebtedness secured by its pledge. By a stroke of the pen, the basis of this assumed profit was swept away. It is now contended that all of this loss, present and prospective, should have been apportioned among the stockholders remaining in the association, and charged up to reduce the withdrawal or book value of the stock, but that the company should have continued in business, notwithstanding ¹⁴ the fact that it had practically nothing with which to meet the applications for withdrawal, or that proceedings for a receivership would have been instituted.

As to the receivership, it may be said that, if this condition of affairs did not amount to insolvency, there would be no justification for it, assuming, what is shown by the evidence in this case, that the affairs of the corporation were honestly administered, though, up to the date of the Simpson opinion, upon a mistaken basis. By pursuing the other course, the inevitable result would have been that every dollar that came into the treasury would have been absorbed by the nonborrowing members, with the result of ultimate insolvency, and of casting the entire burden of the management of the company, its expenses and its losses, including losses which had occurred upon the stock of members who had withdrawn before the Simpson opinion, upon the borrowing members, and in addition the cost of administering the estate as an insolvent one. We do not regard this as a proper course, on account of its manifest lack of equity to the borrowing stockholders. On the contrary, we believe it not only to have been the right of the directory, but its duty, under the circumstances which appeared in this case, to take measures for the equitable administration of the assets of the concern as an insolvent one. The company had been organized and created for certain specific objects. Those objects had been entirely frustrated, and it was impossible for it to meet its obligations. It could not pay the amounts due to withdrawing members, nor obtain funds to lend its stockholders, and therefore could not mature its stock. We are therefore of opinion that, as a building and loan company, it was insolvent, and the assignment was properly made.

¹⁵ We think it immaterial to consider whether there was an actual transfer of the stock, or an actual acceptance or agreement to accept such transfer. The agreement expressed in the letter quoted, *supra*, was to continue the payments on the J. C. Wood stock. Whether such payments were made by appellee

O'Rear upon the stock as belonging to him or upon the stock as belonging to Wood is immaterial. They were made, and must have been made, upon the obligation secured by the duly recorded mortgage in favor of the company. That mortgage and that obligation cannot be considered as having been varied in any particular by the deed from Wood to O'Rear, of which the company was not bound to take notice. It had the right to rely upon the security which it had, and upon the terms of the agreement the performance of which was thereby secured. It could take no personal judgment against appellee O'Rear, and does not now seek to obtain one. But it was entitled to enforce its lien to secure the fulfillment of the contract which it made with Wood, irrespective of any subsequent transfer by him. In the recent case of United States Building etc. Assn. v. Rowland, 109 Ky. 737, 60 S. W. 707, and Globe Building etc. Co.'s Assignee v. Stephens, 22 Ky. Law Rep. 1441, 60 S. W. 723, it was held that no credit in such cases should be allowed for the sums which had been properly carried to the stock account, except when the court conducting the administration has become satisfied that the entire amount of the stock account will not be needed to pay the expenses, losses, and cost of administration. In the case at bar it appears that credit has been conceded for the dividend declared under direction of the court of twenty-five per cent upon ¹⁶ the withdrawal value of the stock. This credit should be allowed. But for the errors indicated, the judgment is reversed, with directions to set aside the judgment and enter a judgment in accordance with this opinion.

The Effect of the Insolvency of Building and Loan Associations on the rights and liabilities of their members is the subject of a monographic note to Curtis v. Granite State Provident Assn., 61 Am. St. Rep. 24-30. As to the right of members to credits for premiums and dues paid, see People's Bldg. etc. Assn. v. McPhilamy, 81 Miss. 61, 95 Am. St. Rep. 454, 32 South. 1001; Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317; Hale v. Cairns, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010; Buist v. Bryan, 44 S. C. 121, 51 Am. St. Rep. 787, 21 S. E. 537; note Curtis v. Granite State Provident Assn., 61 Am. St. Rep. 25-30.

An Assignment for the Benefit of Creditors can be made by an insolvent corporation the same as by a natural person, by virtue of its general power to contract, acquire, and transfer property: Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; Albany etc. Steel Co. v. Southern Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26.

SMITH v. ATKINS.

[110 Ky. 119, 60 S. W. 930.]

NAVIGABLE STREAMS—Use of the Banks in Logging.—

The right to use a stream for navigation extends only to the bed thereof, and not to an appropriation, either permanently or temporarily, of the soil, trees, and vegetation on its banks, as where log-booms are fastened across the stream and the banks are washed away by the accumulation of water and timber. (p. 425.)

Alexander Lackey, for the appellant.

Hager & Stewart and Stewart & Stewart, for the appellee.

121 BURNAM, J. The appellant in this court was the plaintiff in the court below. She alleged that she was the owner and in possession of a tract of land situated in Lawrence county, Kentucky, binding on Big Blaine creek, from where it emptied into the Big Sandy river, up the creek for a distance of about one mile; that appellees had without right entered upon her land, taken possession of the banks, and erected booms across the creek, and fastened them to her land, and had thereby caused large quantities of water, logs, staves, ties, etc., to accumulate against the booms and upon and against her land, and washed away her land, trees, bushes, etc., growing upon her land on the banks of the stream, and were threatening to continue to fasten said booms and other booms to her land—all of which, she complained, was greatly to her injury and damage. The first paragraph of defendants' answer is a traverse of the affirmative allegations of plaintiff's petition. In the second paragraph they say that Big Blaine creek is a navigable stream of water for the purpose of marketing the produce of the forests binding upon the stream; that the only mode of marketing the products of said forests at a reasonable cost is to float it out on the bosom of the creek during high or small tides, and that to do so, and to prevent the loss of the logs, it was necessary to erect booms across said creek to catch and hold them until they could be rafted into the Big Sandy river, and that for this purpose, and for no other, they use the banks and the timber along the creek, in a careful and prudent manner, and no longer **122** than it was necessary to enable them to catch and hold their timber; and denied that any injury resulted to appellant's land, trees, bushes or banks by reason of any wrongful or negligent use of same by them; that the boom at the mouth of the creek was the means of catching railroad ties, staves and saw-logs float-

ing down the creek; and that its banks were charged with this easement and servitude for the benefit of the public. In the third paragraph defendants allege that they had purchased the right to so use the banks from plaintiff's grantor by parol. Plaintiff demurred generally to the whole answer, and also to the first, second and third paragraphs, which were overruled. Thereupon plaintiff filed a reply traversing all of the affirmative averments of the answer. The trial before a jury resulted in a verdict and judgment for the defendants. Appellant objected to the giving of the second and third instructions, which were based upon the second and third paragraphs of the answer, which objection was overruled.

The principal question to be determined upon this appeal is the rights of persons using a navigable stream for purposes of navigation to use the banks, and trees growing thereon, either permanently or temporarily, for their own use, without the consent of the owner. It is insisted by appellees that the right to use the stream itself as a public highway, for purposes of commerce, necessarily includes therein such reasonable use of the banks as is necessary to render the use of the stream itself available. This doctrine was announced in the case of *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621. Our attention has not been called to a case where the question has been considered by this court, but it has been frequently decided by the courts of last resort in other states, and it seems to us ¹²³ that the great weight of authority is in conflict with the conclusions reached by the Oregon court in the case *supra*, and is to the effect that the absolute rights of persons in the use of a navigable stream for the purpose of navigation extend alone to the bed of the stream, and not to the appropriation of the soil, trees, and vegetation on its banks, either permanently or temporarily, to their own use; and such an appropriation is a taking of private property, within the meaning of the law, and cannot be done, either by the public or an individual, without compensation to the owner: See *Cooley's Constitutional Limitations*, 680; *Ensinger v. People*, 47 Ill. 384, 95 Am. Dec. 495; *Carlson v. St. Louis River etc. Improvement Co.*, 73 Minn. 128, 72 Am. St. Rep. 610, 75 N. W. 1044; *Coyne v. Mississippi etc. Boom Co.*, 72 Minn. 533, 71 Am. St. Rep. 508, 75 N. W. 748.

In our opinion, the second and third paragraphs of the answer do not state sufficient facts to support a defense, and the trial court erred in not sustaining the demurrers filed thereto. It consequently follows that the instructions based upon the aver-

ments of these paragraphs were erroneous and prejudicial to the rights of appellant. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

A Navigable Stream may be used in a proper and reasonable manner for floating logs. But if one uses it for that purpose in an unwarranted manner, he will be answerable to riparian proprietors for resulting damages: *Pickens v. Coal River Boom etc. Co.*, 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819, and cases cited in the cross-reference note thereto.

COOPER v. COMMONWEALTH.

[110 Ky. 123, 60 S. W. 938.]

LARCENY.—To Constitute Larceny, there must be a simultaneous combination of unlawful taking, asportation, and felonious intent. (p. 428.)

LARCENY by Retaining an Overpayment.—If a bank, by mistake in making change, makes an overpayment, the person receiving and thereafter converting it is not guilty of larceny, unless he entertained a felonious intent at the time of the payment. (p. 428.)

George A. Prentice, for the appellant.

Robert J. Breckinridge, attorney general, for the commonwealth.

¹²⁴ O'REAR, J. Appellants, Grant Cooper, Fred Cooper, Thomas Harris and Sandy Waggener, were convicted in the Union circuit court of the crime of grand larceny, under the following ¹²⁵ state of facts: The four named had been shucking corn, and were paid six dollars for their services. In order to divide the money equally among themselves, they went to the Bank of Uniontown to have two dollars of the money changed into smaller denominations. Appellant, Sandy Waggener, went into the bank and to the cashier's counter, handed him the two dollars and asked for the change. The cashier handed him two half dollars and a roll of small-sized coin wrapped in paper saying, "There are twenty nickels." Waggener, without unwrapping the coins, and not knowing what was in the paper, except from the statement of the cashier, rejoined his companions; and the four together went a distance of some four

squares, to a more secluded spot, to divide their money. On opening the package they discovered it contained twenty five-dollar gold coins, instead of nickels. Waggener remarked, "Boys, banks don't correct mistakes," and the money was divided among the four and appropriated by them. Upon this evidence the court gave the jury the following instruction: "If you believe from the evidence, to the exclusion of a reasonable doubt, that in this county, and prior to the finding of the indictment herein, the defendants, Grant Cooper, Fred Cooper, and Thomas Harris and Sandy Waggener, sought to have some money changed at the Bank of Uniontown in order to get twenty nickels, or some small change, and that Charles Kelleners, the assistant cashier of said bank, in making said change delivered by mistake to the defendants twenty five-dollar gold pieces, wrapped in a paper, believing at the time that he was giving them twenty nickels, and that the defendants, sharing in that belief, shortly thereafter opened said paper, and found therein twenty five-dollar gold pieces, and failed to return said gold pieces to said bank—now, if you further believe from ¹²⁶ the evidence, to the exclusion of a reasonable doubt, that when said defendants unwrapped said paper, and found therein, and in their possession, the said five-dollar gold pieces, they knew that same had been delivered to them by said Kelleners through mistake, and knew or had the means of ascertaining that the bank was the owner of said gold pieces, but thereupon nevertheless feloniously converted the same to their own use, intending to permanently deprive the owner thereof, you will find them guilty as charged; and in your verdict you will fix their punishment at confinement in the penitentiary for not less than one nor more than five years." Appellants objected to the foregoing, and asked the court to give the jury these instructions: "(a) The court instructs the jury that, to find the defendants guilty of larceny, they must believe that at the time they received the money from Charles Kelleners they must have then had the purpose and intent to convert the excess which they received over and above what was justly due them as change to their own use and benefit, and to deprive the bank of its money feloniously; that, unless the felonious intent was proven at the time of receiving the money, the law is for the defendants, and the jury will so find. (b) The court instructs the jury that the felonious intent must exist at the time of receiving the money, and that no felonious intent, subsequent or wrongful conversion, will amount to a felony"—which were rejected by the court.

It was held in *Elliott v. Commonwealth*, 12 Bush, 176, that where the possession of the goods was obtained by the accused for a particular purpose, with intent then, however, on the part of the accused, to convert them to his own use, which he subsequently did, it would constitute larceny. In *Snapp v. Commonwealth*, 82 Ky. 173, we held that, where ¹²⁷ money came into the hands of the accused lawfully, his subsequent felonious conversion would not be larceny. In the last-named case the court said it devolved upon the commonwealth to show an unlawful taking of this money from the city (the owner) by the accused with a felonious intent, and that "the money had been received without fraud and as a matter of right, and in such a case, although he may have the animus furandi afterward, and convert it to his own use, he was not guilty of larceny." In *Smith v. Commonwealth*, 96 Ky. 87, 49 Am. St. Rep. 287, 27 S. W. 852, this court announced: "The general and common-law rule is that when property comes lawfully into the possession of a person, either as agent, bailee, part owner, or otherwise, a subsequent appropriation of it is not larceny, unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands." Wharton's Criminal Law, section 958, says: "To constitute larceny in receiving an overpayment, the defendant must know at the time of the overpayment, and must intend to steal." The authorities seem to be agreed that, to constitute the crime of larceny, there must be a simultaneous combination of an unlawful taking, an asportation, and a felonious intent.

We conclude that the instructions asked by appellants should have been given to the jury, and that the idea expressed in the first instruction given—that if appellants received the money under a mutual mistake, and after discovering it feloniously converted it—should not have been given.

Judgment reversed and cause remanded for a new trial, and for proceedings consistent herewith.

The Principal Case is cited and considered with other similar decisions in the monographic note to *People v. Miller*, 88 Am. St. Rep. 600, on larceny.

JOLLY v. COMMONWEALTH.

[110 Ky. 190, 61 S. W. 49.]

CRIMINAL LAW—Defense of Insanity.—An instruction defining the degree of insanity which will render one criminally irresponsible for homicide, as such a defect of reason as to disable him from knowing the nature of his act, or, if he did know, from knowing that it was wrong, is erroneous. The absence of self-control by reason of unsoundness of mind is omitted. (p. 432.)

CRIMINAL LAW—Defense of Insanity.—The True Test of criminal responsibility is whether the accused has sufficient reason to know right from wrong, and whether he has sufficient power of control to govern his action. (p. 432.)

CRIMINAL LAW—Reasonable Doubt.—In Instructions on reasonable doubt it is best simply to follow the language of the statute: "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal." (p. 433.)

HOMICIDE—Manslaughter.—An instruction on manslaughter is properly refused when there is no provocation, and nothing to reduce the crime to manslaughter. (p. 433.)

HOMICIDE, Trial for—Prejudicial Error.—The Appellate Court will not say, where the death penalty has been imposed, that the substantial rights of the accused were not prejudiced by instructions leaving out a ground of defense. (p. 433.)

HOMICIDE—Malice Aforethought.—The Words "with malice" denote a wrongful act done intentionally, without just cause, and the term "aforethought" means a predetermination to do the act, however sudden, or recently framed in the mind, before the act is done. (p. 433.)

S. C. Bailey, for the appellant.

R. J. Breckinridge, for the appellee.

191 HOBSON, J. Appellant was indicted for the murder of Emma Klekamp. The jury to whom the case was submitted found him guilty as charged, and fixed his punishment at death. Judgment was entered upon this verdict. The only grounds of reversal necessary to be noticed relate to the instructions to the jury given and refused by the court on the trial. To understand these properly, we must briefly state the facts shown by the evidence.

The proof showed that appellant, Jolly, was the brother in law of the deceased, Emma Klekamp. In July, 1900, Jolly and wife were living at Hamilton, Ohio, keeping house. His mother in law, Mrs. Klekamp, and her oldest daughter, Minnie, paid them a visit. Mrs. Jolly came home with Miss Minnie to Newport, where her father lived, bringing with her most of the personal property in the house. Jolly followed them to New-

port, and made several unsuccessful attempts to see his wife. He finally secured an interview with her at the office of his attorney, O. W. Root, in which she declined to return to him, the deceased, Emma Klekamp, being present. He was impressed with the idea that his father in law and family were keeping his wife from him, and continued his efforts for further interviews, with a view to her return to him, and was greatly disturbed. He stayed at the house of his sister. She testified as follows: "He came to our house on Wednesday morning. I was washing. He says, 'Sister, I am all left alone,' and he said, 'I am going to hunt my wife; I am going to hunt my wife; I am going to hunt her'; and I didn't see him any more until 12 o'clock. I never had him still a moment. He never ate and he never slept. He done nothing but run and storm. He was off and on, and up and ¹⁹² back again. I said to him, 'John, please be still; after a while, perhaps, this will change.' He would answer, 'I can't do it; I can't do it. I love my wife.' Q. Did you see him the day he shot Emma Klekamp? A. He never got up; he was up all night. Q. Where was he that night? A. He never went to bed, and when I came downstairs I put him in the sitting-room, and he looked so wild that I never said anything to Mr. Hewitson. And I kept all this from my husband, to try to give him a home, and see if he wouldn't be better. In the night he would go out the side screen door, and go right round again, and leave the door open, and every night our house was left open. I would come down the stairs, and tell him he ought not to unlock the doors. 'I didn't do it, sister'; yet I know he did do it. He was the only one that did do it." Several days before the homicide he had asked his attorney, E. H. Kilpatrick, to write to his wife, and try to get an answer in her handwriting. This was after a number of other letters had been written. Kilpatrick testified as follows: "I noticed that Jolly, he would come into my office some days twenty-five times a day, and at night he would come in there and bother me until bedtime, and talk foolishly; and every time he had some new hobby, and I noticed that Jolly was, in my opinion, an unsound man. The day before the tragedy, I wrote up to Mrs. Jolly to please call at the office. If I could see my handwriting, I could identify it; and I got a little bit of a piece of paper about that size, and I read it to Jolly: 'I will not come; I don't want you to bother me.' That was about fifteen minutes after eleven when it came. Mr. Jolly left my office without saying one word. He was an insane man

if I ever seen one. He left without saying one word. He went out, and in about ¹⁹³ three-quarters of an hour some one said to me: 'Do you know your client has done an awful thing? He has killed his sister in law and his wife, and he is now being taken down to jail in a patrol wagon.' Q. How long was it, you say, before Jolly killed his sister in law that you saw him the last time? A. About a quarter after eleven I got that note, and in three-quarters of an hour this terrible thing had been committed. Q. Was he then in a condition to distinguish between right and wrong? A. The man was diseased, and of unsound mind, and I am satisfied the man couldn't distinguish the consequences of his act." After leaving the lawyer's office at 11:15, Jolly next appeared at the Klekamp residence at 11:40. When first seen, he was standing in the kitchen, with a revolver in his hand, holding it up over his head. He asked Emma Klekamp for his wife. She said that his wife was not in. He said he was going to shoot his wife. He then reached for the pantry door. Emma gave Minnie Klekamp, who was sitting in the next room, a sign to call for help. She ran out and cried murder. Jolly opened the pantry door. His wife was in the pantry. He got her out, and drove her in the dining-room. Then she got in the pantry again, and he got her out, and as he did so she fell. As she was getting up, he fired on her, shooting her in the back. She crawled out of the kitchen on her hands and knees. He then seized Emma Klekamp, and drew her face down beside him, and putting the pistol close to her face, shot her through the brain, killing her instantly. Just then help came in, and he was disarmed and taken away. There was other testimony introduced on behalf of appellant, corroborating the statements of his sister and the attorney above quoted. There was also testimony by the commonwealth ¹⁹⁴ showing that he was not of unsound mind. Mr. Root, who was introduced on his behalf, said he was a mental degenerate.

On this evidence, the court below instructed the jury as follows: "1. If the jury believe from all the evidence beyond a reasonable doubt that in killing Emma Klekamp, in this county and state, and on the seventh day of August, 1900, the defendant, John W. Jolly, willfully, wrongfully, feloniously and with malice aforethought, express or implied, shot her with a pistol loaded with a leaden bullet or other hard substance, from which shooting said Emma Klekamp then and there died, they will find him guilty of willful murder, and in their discretion fix his punishment at death or confinement in the penitentiary for and during

his natural life; otherwise they will acquit him. 2. If, however, the jury believe from all the evidence that the defendant, John W. Jolly, on the seventh day of August, 1900, in this county and state, in killing said Emma Klekamp, shot her with a pistol loaded with a leaden bullet or other hard substance, from which shooting said Emma Klekamp did then and there die, but also believe that at the time of said shooting said John W. Jolly was laboring under such a defect of reason not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know it was wrong, they will acquit him on the ground of insanity, and so state in their verdict. 3. If the jury entertain a reasonable doubt as to any facts necessary to constitute defendant's guilt, they must acquit him."

The only defense relied upon for appellant was insanity. It will be observed that the second instruction, which defines the degree of insanity rendering appellant irresponsible criminally for his act, sets it out as such a defect of reason as to disable him from knowing the nature and ¹⁹⁵ quality of the act, or, if he did know it, from knowing that it was wrong. The absence of self-control by reason of unsoundness of mind is entirely omitted. Many insane persons have remarkable intelligence, and are yet truly of unsound mind and wholly irresponsible. In *Graham v. Commonwealth*, 55 Ky. 592, the jury was instructed that "the true test of responsibility is whether the accused had sufficient reason to know right from wrong, and whether or not he had a sufficient power of control to govern his action." In *Smith v. Commonwealth*, 62 Ky. 224, the subject was discussed at length, and this instruction was approved as expressing the true rule. It is true that this case, in so far as it lays down the rule applicable to insanity from voluntary intoxication, was overruled in *Shannahan v. Commonwealth*, 71 Ky. 463, 8 Am. Rep. 465, but it has not been otherwise criticised. On the contrary, it is referred to with approval in *Kriel v. Commonwealth*, 68 Ky. 362, where the instruction above quoted was also given and approved in *Brown v. Commonwealth*, 77 Ky. 398. These cases are in accord with the great weight of modern authority and were recently followed in *Abbott v. Commonwealth*, 107 Ky. 624, 55 S. W. 196. In lieu of instruction No. 2 above quoted, the court should have instructed the jury as in instructions "a" and "b" given in that opinion.

The first instruction given by the court is objectionable in its phraseology, and it will be better, on another trial, to give in

lieu of it instruction No. 1 asked by the commonwealth substituting the words, "before the finding of the indictment herein," for the words "on the seventh day of August, 1900," in that instruction.

The third instruction may not have misled the jury; for, taking all the instructions together, they perhaps understood that the facts necessary to constitute appellant's guilt were those set out in the preceding instructions. But ¹⁹⁶ as this court has often said, in instructions on reasonable doubt it is best simply to follow the language of the code: "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal": Code, sec. 238.

The court properly refused to instruct the jury on the law of involuntary manslaughter. There was absolutely no provocation, and nothing to reduce the crime to manslaughter. It is earnestly argued for the commonwealth that, in view of the facts of the case, the judgment should be affirmed on the ground that the substantial rights of the appellant were not prejudiced. But in a case where the death penalty has been imposed we do not feel at liberty to say that the substantial rights of the appellant were not prejudiced where the only defense on which he relied was unduly curtailed by the instructions given the jury, and a material ground of defense entirely left out. To hold otherwise would be for this court to determine his guilt or innocence, and deny him a trial on the merits of his case before a jury of his peers, as provided by the constitution.

In addition to the instructions we have indicated, the court should, on another trial, instruct the jury that the words "with malice," in their legal sense, denote a wrongful act done intentionally, without just cause, and that by the term "aforethought" is meant a predetermination to do the act, however sudden, or recently formed in the mind, before the act is done. It has been held error to instruct the jury that malice may be implied from certain facts; but it is proper to define the technical terms used in the charge, for without this the jury may be misled by them. There was no error in overruling the demurrer to the indictment, ¹⁹⁷ or in the admission or rejection of evidence. Judgment reversed, and cause remanded for a new trial, and for further proceedings consistent with this opinion.

Chief Justice Paynter dissents.

Insanity as a Defense to Crime is the subject to monographic notes to *Knights v. State*, 76 Am. St. Rep. 83-97; *People v. Hubert*, 63 Am. St. Rep. 100-106; *Parsons v. State*, 60 Am. Rep. 212-225; *State* Am. St. Rep., Vol. 96—28

v. Marler, 36 Am. Dec. 402-411. It is said that a person may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act in question, and to understand the consequences of its commission, and yet be so far deprived of volition and self-control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not capable of entertaining the intent necessary to constitute a crime: State v. Peel, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.

DICKINSON v. JOHNSON.

[110 Ky. 236, 61 S. W. 267.]

OFFICER'S SALARY—Subjecting to Debts.—Under a constitutional provision that no officer except the governor shall be allowed over five thousand dollars compensation per annum, public policy demands that the courts refuse to require any officer to set apart any portion of his salary for the payment of his debts. (p. 442.)

OFFICER'S SALARY.—The Assignment by an officer of the fees and emoluments of his office in the future is void and against public policy. (pp. 440, 442.)

OFFICER'S SALARY not Exempt When Invested in Land.—An officer's fees or salary is not, when invested in real estate, exempt from antecedent debts. (p. 442.)

W. W. Thum and Stanley E. Sloss, for the appellant.

Kohn, Baird & Spindle, for the appellees.

239 GUFFY, J. The appellee, William P. Johnson, is, and has been for several years, clerk of the Jefferson county court, entitled to a salary, payable by the state, amounting to five thousand dollars per annum. The other appellee is his wife. Some time prior to the institution of this action the appellant obtained a judgment in the Jefferson circuit court against the said William P. Johnson for the sum of three thousand three hundred and thirteen dollars and twelve cents, with interest from August, 1897, upon which judgment execution was issued to the proper county, which was returned by the sheriff, in substance, "No property found." The object of this action is to enforce the collection of said judgment. The two principal funds or items of property sought to be subjected are a reasonable portion of appellee's salary and certain real estate in Jefferson county which is alleged to have been purchased and paid for, to the extent that it has been paid for at all, by the said William P. Johnson, but that the same was conveyed to the wife, Emma Johnson, for the purpose of delaying, hindering and de-

frauding the creditors of the said William P. Johnson. It is also alleged in the petition that William P. Johnson, Jr., a son of the said appellee, and a minor, is working for a salary of two thousand dollars. The prayer of the plaintiff, in substance, is for an attachment against the property of said William P. Johnson, and that he be compelled to make a discovery of any money, choses in action, or legal and equitable interest, or any other ²⁴⁰ property, and the amount of same, and to disclose when and in what sums and how the salaries of himself and son are collected, and that so much of the said property be subjected to the satisfaction of plaintiff's claims as is necessary, and that the real estate and improvements be adjudged the property of said William P. Johnson, and that the same be subjected to the satisfaction of his debt, and that out of his salary he be required to provide for and pay this judgment, and for all proper and equitable relief, general and special. The answer of the appellees, after denying that either Johnson or any of his family are living upon or occupying the ground or premises described in the petition, states, in substance, that the title to the property was not placed in the said Emma for the purpose of delaying creditors, and that appellee, William, should not be required to set apart any of his salary for the payment of the plaintiff's debt. The answer further avers, in substance, that the salary is paid to him for services as clerk of the Jefferson county court, and that he has no interest or right over any part of the salary paid to his son William P. Johnson, Jr., or that he exercises or ever has exercised any right to said salary, and that he would not have any right so to do. It is then further stated that, long before the giving of the note upon which the judgment was rendered, he was indebted to his wife in the sum of more than twenty thousand dollars, and long before the transfer of the land; that he is now county clerk as aforesaid, and that under and by virtue of the laws of Kentucky the said salary is exempt from execution, attachment or garnishment; that, in part satisfaction of his indebtedness to the said Emma, he did assign and transfer the salary to be paid to him to her, the said Emma, and out of said salary so transferred the said ²⁴¹ Emma made the payments that have been made on the property, etc. It is also claimed that they have been occupying the same as a home, and only temporarily absent. The reply may be considered a complete traverse of all the matters relied on as a defense. Upon final hearing the court adjudged in favor of the appellees, and from that judgment this appeal is prosecuted.

It is the contention of appellee that under no state of case could he be required to set apart any part of his salary for payment of the debt in question. He also contends that he had received, many years before he incurred the debt sued on, a large amount of money from his wife, and that he had a right to pay the same to her, either by an assignment of the salary, or by having the land in question conveyed to her. The appellant contends that, after allowing the said appellee, Johnson, a sufficient amount of the salary to support himself and family in a style commensurate to his surroundings and social position, he should be required to set apart annually, or from time to time as his salary is paid, the surplus, to be applied to the payment of the judgment sued on. Appellant further contends that the money received by appellee from his wife was not an indebtedness of appellee, and that the payment for the real estate in question was in fact and law paid for by or with appellee's money, and therefore the real estate is liable or ought to be subjected to the payment of plaintiff's claim. It is further contended by appellant that the question involved as to the salary has never been passed upon by this court; that the decisions heretofore rendered where parties sought to garnish fees or salaries of officers have no application to the question involved in this case. It is not contended ²⁴² that the plaintiff could attach salaries in the hands of the state or its officers, and require the money to be paid directly to the plaintiff, but it is contended that the court may lawfully require the appellee to pay into court or to its receiver, in installments, so much of the salary as is not necessary for his support as aforesaid. Many authorities are cited by appellant.

We are not aware of any decisions of this court in which the precise question here presented has ever been passed upon, nor do we find any statute expressly providing that officers' fees or salaries shall not be subjected to the payment of debts against them. But it is very earnestly contended for appellee that various decisions of this court announce the doctrine that it is contrary to public policy to so subject the fees or salaries of officers. But, as before intimated, the appellant contends that no such rule or doctrine is contained in any of the decisions in this court, and refers us to many decisions which, as he assumes, sustain his contention. We will now proceed to notice some of the authorities from states other than Kentucky relied on in support of appellant's contention. *Pendleton v. Perkins*, 49 Mo. 565, is cited. The court in that case held that, not-

withstanding municipal corporations are exempt by statute from creditors' bills or garnishment, nevertheless money due the defendants in the city treasury might be subjected by proceedings in equity for the payment of plaintiff's claim. But from the opinion in this case we find that the debtor was not an officer. And it seems that, even in the absence of such statute, it has been held that towns and cities could not be garnished for a sum due an officer as part of his salary: *Fortune v. City of St. Louis*, 23 Mo. 239; *Hawthorn v. City of St. Louis*, 11 Mo. 59, 47 Am. Dec. 141. The court further ²⁴³ said: "Public policy forbids creditors from thus stepping in between the city and its public servants; and a statute, in seeking to prevent any future attempt in that direction, went much further, and included all kinds of liabilities, so that a debtor's funds, if in the hands of a municipal corporation, are placed beyond the reach of his creditors by statutory garnishment." The court, however, held in this case that the funds of the debtor were not exempt simply because the same are placed in the city treasury, or under the control of the city. *Dillon on Municipal Corporations*, section 101, is also cited, together with the notes. We are unable to see that either the author or the notes sustain appellant. The weight of authority referred to by the writer, as well as his own opinion, seems to be, even in the absence of statute, that municipalities are not subject to garnishment for the salaries of its officers. The case of *Luthy v. Woods*, 1 Mo. App. 167, holds that, although a municipality is not subject to garnishment, a debt due from it to a debtor may be reached by proceedings in equity, and subjected to the payment of plaintiff's claim, although the municipality is not subject to garnishment. But it does not appear in this case that the debt there subjected was the salary of an officer. We are unable to see that the opinion in *McDermutt v. Strong*, 4 Johns. Ch. 690, has any bearing upon the case at bar. In *Lyell v. Board*, 3 McLean, 580, Fed. Cas. No. 8621, the plaintiff sought to subject certain bonds, mortgages and assets under the control of defendants for payment of two judgments at law recovered against them. The court below sustained a demurrer, but the supreme court reversed the judgment, and, after a discussion of the questions involved, from which it appears that under the statute of Michigan the ²⁴⁴ county might be sued, said: "The county being made subject to a suit, no serious objection is perceived against reaching the rights in question by the ordinary exercise of chancery powers, independently of statutory provisions." It appears from the opinion

in *Furlong v. Thomssen*, 19 Mo. App. 364, that the court held that a debt due by a municipal corporation to its creditors may, by a creditors' bill, be subjected to the satisfaction of judgment against the latter. In this case it appears that the debt due Thomssen was for erecting an engine-house for the city. In *Browning v. Bettis*, 8 Paige, 568, it is, in substance, held that the salary or compensation to become due at a future time for the performances of services which had not been completed at the time of filing the bill could not be reached by a creditor's bill. But where all the services, to entitle defendant to his salary or compensation, had been rendered at the time of filing the complainant's bill, such salary or compensation may be reached by the creditor, although it had not become actually payable when the bill was filed. It seems that the defendant in this case was a census taker. It was decided in *McCoun v. Dorsheimer*, 1 Clarke Ch. 144, that the unearned salary of an officer cannot be reached by creditors' bill, but so much of the salary as is earned and due at the time of the filing of the bill may be subjected. The same doctrine announced in the case, *supra*, is reaffirmed in *Smith v. ———*, 4 Edw. Ch. 653. The object there sought was to subject one quarter's salary of one of the judges of New York City. It may be inferred from the decision in *Hadley v. Peabody*, 13 Gray, 200, that the supreme court of Massachusetts sustains the doctrine announced in the foregoing opinions. The supreme court of Arkansas decided in *Riggin v. Hilliard*, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. 245 W. 402, that (we quote from the syllabus): "While a county is not subject to the ordinary process of garnishment, yet, in equity, when the interest of the public will not be injuriously affected, the claim of an insolvent creditor of the county may be subjected, by sale or compulsory assignment thereof, to the payment of his debts." The demand sought to be subjected was a debt due from the county to the defendant for repairing the courthouse. The court, in the opinion, said: "The courts commonly concur in holding that public policy forbids any interference between the county and its contractor under such circumstances if the work is still in progress, for the interference would tend to retard the occupancy of the building." The court, in discussing the fact that the county could not be sued, recognized the doctrine to be that a county was not subject to garnishment, and in referring to the case of *Boone County v. Keck*, 31 Ark. 387, said: "It was a suit directly against the county. The plaintiff's judgment debtor was not a party to it,

and the only relief asked was against the county. In the case at bar the plaintiff's debtor is the party against whom relief is sought, and the county is not sued. Therein lies the cardinal difference between the cases. The complaint states a cause of action against Hilliard, and shows a right in the plaintiff to subject the debt due by the county to the satisfaction of his demand. That can be accomplished under proper orders of the court, as by a sale or compulsory assignment of the debt for the purpose of applying the proceeds to the satisfaction of any judgment which the plaintiff is entitled to recover." In *Knight v. Nash*, 22 Minn. 453, the supreme court of Minnesota held (quoting from the syllabus) that: "A debt due from a municipal corporation to a judgment debtor, even though ²⁴⁶ denied by the corporation, may be reached by a final order upon disclosure, directing the transfer of the claim, and appointing a receiver to collect it for the benefit of the creditor. The rule that a debt due from a municipal corporation cannot be reached by process of garnishment has no application to an order of this character." The debt sought to be subjected in this case was not due as salary or fee. We fail to see that the case of *Whidden v. Drake*, 5 N. H. 13, has any application to the case at bar. The supreme court of Connecticut, in *Bray v. Town of Wallingford*, 20 Conn. 416, held that a town is subject to the process of attachment in a suit brought against its creditor. The supreme court of Ohio, in *City of Newark v. Funk*, 15 Ohio St. 462, decided that salaries of officers of incorporated cities, due and unpaid, might be subjected by judgment creditors of such officers to the payment of such judgments, under the provisions of the Code of Civil Procedure. The code provision referred to is substantially the same as the provisions of the Kentucky Code in regard to the enforcement of judgments. 2 Shinn on Attachments, section 501, is cited by appellant, but the doctrine there announced does not seem to be different from that announced in the opinions, *supra*.

This action is assumed to be authorized by section 439 of the Civil Code of Practice of Kentucky, which we deem it unnecessary to quote. This appellant refers us to numerous decisions of this court in support of his contention which we have carefully examined, but deem it unnecessary to refer to in detail, but will only refer to such as we think necessary. It was held in *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215, that a contract by which the clerk of the Louisville chancery court transferred and assigned to a trustee, for the benefit of appellant, in consideration of a debt ²⁴⁷ due him, all the fees and emoluments of his

office in the future, until the debt was paid, with conditions to pay deputies, etc., was void. It is against public policy that such contracts should be enforced. That the auditor has, under the statute, the right to look to the clerk for taxes on suits collected by him. The trustee will not be recognized as the person to receive them. In *Johnson v. Elkins*, 90 Ky. 163, 13 S. W. 448, it was held that when pension money was invested in land the land was subject to the debts of the pensioner. This proposition has been so often and so recently decided that any further reference to the same is unnecessary. It may be remarked that it was decided by this court in *Hudspeth v. Harrison*, 6 Ky. Law Rep. 304, that pension money is exempt only until it reaches the hands of the pensioner. In *Rodman v. Musselman*, 75 Ky. 354, 23 Am. Rep. 724, it was held that salaries of officers of towns and cities may be attached and subjected to the payment of their debts; but the salary of a state officer cannot be attached, because the state, being a necessary party, cannot be sued. It is otherwise as to a town or city. *Stone v. Mayo*, 21 Ky. Law Rep. 1559, 55 S. W. 700, is referred to. The opinion in this case holds that the auditor might withhold money due a circuit clerk on account of the clerk's official indebtedness on account of unconstitutional payments made to him as clerk during a former term of office, the action of the auditor being based upon section 4701 of the Kentucky Statutes. It was said in the opinion that there seemed to be no reasons of public policy which would preclude the auditor from so withholding the former indebtedness of the clerk of the commonwealth. It may be conceded that this court, in *Teeter v. Williams*, 42 Ky. 562, 39 Am. Dec. 485, in substance decided that the plaintiff, by the aid of the chancellor, ²⁴⁸ could attach whatever might be due his debtor for labor already performed, and he might attach whatever might become due upon an existing contract for his future labor. But neither the creditor nor chancellor could compel him to work out his part of the contract, so as to earn the promised reward for the exclusive use of his creditor. In the case of *Kennedy v. Aldridge*, 44 Ky. 141, it appears that Robinson, by the authority of Kennedy, had drawn fifty dollars as his compensation, as one of the commissioners of Garrard county, for taking in the lists of taxable property. The court below held that the money in Robinson's hands was subject to the attachment. In passing upon this question, this court said: "It is contended, on the authority of the case of *Devine v. Harvie*, 7 T. B. Mon. 439, 18 Am. Dec. 194, that the fund

now in question, being the compensation payable by the state to a public officer or agent, should be protected until it reaches the hands of the officer or agent. But this case differs essentially from the one referred to, in the fact that in that case the money attempted to be appropriated to the satisfaction of the creditor's demand remained in the treasury, whereas in this it has been paid to the authorized agent of the person entitled to receive it from the state. The objection that the act authorizing the attachment and subjection of the debtor's choses in action does not include his debts due from the state does not, therefore, apply in this case." We have examined the case of *Speed v. Brown*, 49 Ky. 108, but the doctrine therein announced is in accord with other decisions noticed; hence we need not restate the same proposition.

The appellees cite numerous authorities in support of their contention, which we have examined at great length. It may be taken as well settled that in the case of jailers ²⁴⁹ school commissioners, and school teachers, their salaries should not be subjected to the claims of creditors, for reasons given in the several opinions. The opinions chiefly rest upon the ground of public policy—that the salaries are necessary to enable those officers to discharge the duties resting upon them. It is not the contention of appellant that he can, by an ordinary attachment of garnishment, subject the salary of appellee, nor appropriate the whole of it to the payment of his claim. It is the contention of appellant that the proof in this case shows conclusively that three thousand dollars per annum is amply sufficient to support the appellee in the style in which he moves, and sufficient for an ample support commensurate with his social position; and it is argued that a court of equity has the power, and that it ought, by appropriate orders, to compel the appellee to set aside from time to time a reasonable portion of his salary for the payment of plaintiff's claim. It may be conceded that there is some conflict of authority upon this question. It does not seem to have ever been directly passed upon by this court. Nor do we deem it necessary to now decide as to the power of a court of equity to make such orders as are contended for by appellant. Undoubtedly, one of the objects in allowing to officers fees or salaries is for their support, and to enable them to discharge the duties of office; but we are not inclined to the opinion that it was the intention of the lawmakers to limit such compensation to the actual necessities of life, but, rather, that it was intended to allow such officers compensation commensurate with the offi-

cial duties and responsibilities devolving upon them. And inasmuch as most men desire to accumulate something, and the public commends such desire, we think it not unreasonable that the lawmakers intended that the ²⁵⁰ officers might have like opportunities. Under our present constitution, no officer except the governor is allowed a greater compensation than five thousand dollars per annum. This being true, we think public policy demands that the courts refuse to require any officer to set apart any part of his salary for the payment of his debts. The judgment of the court below is therefore affirmed in respect to this question.

It is, however, earnestly contended for appellant that the real estate mentioned in the petition should be held subject to plaintiff's claim, while it is equally as earnestly contended for appellee that he has a right to assign his salary to his wife, or to have the land in question deeded to her, and especially so for the reason that he had received large sums of money from her in the past, and that he desired to pay the same. That he did receive such large sums of money from her is clearly proven in this case. We have already referred to the decision holding the assignment of fees to be void and against public policy. It has been repeatedly decided by this court that pension money received by a pensioner and invested in real estate can be subjected to the demand of an antecedent creditor, and it would be entirely inconsistent with such a rule to hold that officers' fees or salary invested in real estate should be exempt from antecedent debts, even if we were deciding—which we are not—that an officer's fees or salary are exempt by statute from the debts of the officer. It is further suggested for appellee that, even if the debt due his wife was barred by the statute of limitation, he had a right to waive that statute and pay the debt, which he undoubtedly did have, if such a debt existed, and its payment was not prejudicial to the rights of another. After a careful consideration of the law and ²⁵¹ facts, we have reached the conclusion that the relation of creditor and debtor did not exist between the appellees at the time of the purchase and conveyance of the real estate in question. It therefore follows that the conveyance to Mrs. Johnson was without consideration and void as to creditors, and that the court erred in refusing to subject the same to the payment of plaintiff's claim. The judgment to that extent is therefore reversed, and the cause remanded, with directions to adjudge the real estate subject to plaintiff's claim, and for proceedings consistent herewith.

**SUBJECTING THE SALARIES OF PUBLIC OFFICERS TO THE
PAYMENT OF THEIR DEBTS.***

- I. Exemption of Compensation for Public Services.**
 - a. The General Rule and Reasons Therefor.
 - b. Criticism of the Doctrine.
- II. Circumstances Affecting the Exemption.**
 - a. Character and Source of the Remuneration.
 - b. Time of Subjecting the Salary.
 - c. Remedies Employed and Manner of Subjection.
 - d. Particular Statutory Enactments.
- III. Exemption of Particular Salaries.**
 - a. Of State and United States Officers.
 - b. Of County, Town, and City Officers.
 - 1. The General Rule.
 - 2. Modification by Special Statutes.
 - 3. Waiver of the Immunity.
 - c. Of School Teachers and Superintendents.

I. Exemption of Compensation for Public Services.

a. **The General Rule and Reasons Therefor.**—It is well-nigh universally established, as a general proposition, that the salary of a public officer cannot, while in the hands of a disbursing agent of the government, be diverted from its legitimate object by attachment, execution, or other process, and subjected to the payment of his private debts: *Moll v. Sbisa*, 51 La. Ann. 290, 25 South. 141; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448; *Shinn v. Zimmerman*, 23 N. J. L. 150, 60 Am. Dec. 260; *Waldman v. O'Donnell*, 57 How. Pr. 215; *Remmey v. Gedney*, 57 How. Pr. 217; *Hutchinson v. Gormley*, 48 Pa. St. 270. The exemption is not for the personal benefit of the officer, but is for the protection of the public. There is danger that the public service would be impaired if municipalities could be drawn into controversies in which they have no interest, or if their servants should be hampered in the performance of their duties by having their remuneration intercepted by their creditors. These two considerations of public policy—the latter probably being the more potent—are assigned as a justification for the exemption of the compensation of public officers from the claims of their creditors: *Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177.

A few extracts from the opinions of leading decisions are here given for the purpose of showing in full the theory of public policy upon which the adjudications proceed. Justice Mitchell, speaking for the Minnesota court in the case just cited, wherein the salary of a municipal officer was sought to be reached by proceedings supplementary to execution, said: "Numerous authorities hold that municipal corporations and their officers are exempt from garnishment, for the reason that otherwise public officers would be constantly harrassed by such process, and compelled to be absent from

***REFERENCES TO MONOGRAPHIC NOTES.**

Garnishment of the United States, states, counties, cities, and other municipalities: 18 Am. Dec. 200-207; 51 Am. St. Rep. 114-121.

their offices in attendance on courts, to the serious interference with the performance of their official duties. This was decided to be the law in this state at an early date. The reason assigned for this rule would apply to all cases, without reference to the character of the fund or claim sought to be reached by the garnishment; but, of course, would have no application to the present proceeding, which is against the defendant alone. But it has also been often held that the salary of a public officer due him from a municipal corporation cannot be reached or intercepted by his creditors by legal process. The reason assigned for this is, in substance, that municipal corporations are auxiliary to the state government; that their officers are public servants, employed to perform public duties; that the public have a right to fill these offices by the selection of the most suitable men; that these officers are usually dependent on their salaries for the support of themselves and families; that the efficiency of their services, or even their remaining in the public service, may depend upon the prompt payment of their salaries, and the certainty that they will receive them when due. Hence, if creditors can step in by any legal proceedings and prevent the payment of salaries directly to the officers in person, and divert the money to the satisfaction of their claims, the public service would suffer by impairing its efficiency, and perhaps depriving the public of the service of men whom it would desire to retain."

"All the cases we have consulted upon these questions," observes the court in *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661, "seem to rest their decisions upon a branch of the great public principle which exempts an ambassador, a foreign minister, charge d'affaires, consul, members of a legislature or other public functionaries, while in office and in the public service, from civil arrest or other legal embarrassment at the suit of a private party. Without such a rule, it would frequently be in the power of an individual to endanger the public interests or even check the wheels of government, which would be a far greater public evil than the occasional delay or even sacrifice of a private right. The exemption is not given to the person for a private advantage, but granted to the office from public necessity."

The salary of state officer was attempted to be attached in *Bank of Tennessee v. Dibrell*, 35 Tenn. (3 Sneed) 379. "Every consideration of policy would forbid it," said the court. "No government can sanction it. It would be very embarrassing generally, and, under some circumstances, might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted in the hands of distributing agents. If the funds of the government, thus specifically appropriated for the support and maintenance of its agents, were allowed to be diverted by process of attachment, in favor of creditors, or otherwise, from their legitimate object, the functions of the government might be suspended. . . . In this, as well as many other cases, the most strong

and meritorious private rights must be made to yield to the public interest. It is a pervading principle in all governments, that where private and public interests come in conflict, with proper exceptions, the latter must yield."

In *Buchanan v. Alexander*, 4 How. 20, money in the hands of a purser, due to seamen, was held not subject to attachment by their creditors. Said Justice McLean: "The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and navy; and also, in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At times it would be found embarrassing, and under some circumstances it might be fatal to the public service. The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen."

b. Criticism of the Doctrine.—Probably the adverse consequences that would result from permitting the salaries of public officers to be liable to subjection for the payment of their debts have been not inconsiderably magnified, still it must be admitted there is a public policy in holding them exempt which possibly compensates for the injustice to private creditors and for the abuses to which the exemption is subject. The soundness of the doctrine has been questioned in more than one instance. In *Thompson v. Cullers* (Tex. Civ. App.), 35 S. W. 412, it is decided that the garnishment of the earned fees of an officer is not against public policy. But this decision seems opposed to two adjudications of the same court: See *Highland v. Galveston*, *White & W.* (Tex. Civ. App.), sec. 623; *Sanger Bros. v. Waco*, 15 Tex. Civ. App. 424, 40 S. W. 549. Curiously enough, these cases make no reference to one another; each seems to be decided without regard to the others.

According to *Waterbury v. Board of Commissioners*, 10 Mont. 515, 24 Am. St. Rep. 67, 26 Pac. 1002, a county is liable to garnishment for a salary due to its officer, under a statute declaring that all persons are subject to garnishment, that the word "person" may be applied to "bodies politic and corporate," and that counties

are such bodies. "We cannot agree," says Justice De Witt, "that there is any reason why the great public duties of a county need be imperfectly performed, or that its business is in any danger of derangement, if it is compelled, by process of a court, to pay the salary of a servant to that servant's creditors. The county has no suit to defend, no counsel to employ, no witnesses to collect and pay. It has no burden cast upon it, and no duty to perform, except to act as temporary stakeholder, to await the determination of a court, in an action in which the county has no interest. The argument of public policy as to convenience to the county and its officers does not reach our mind with sufficient force to impair another view of law and right that is recognized throughout the civilized world; that is, that debtors should pay their debts. This, of course, with the modification that the means of livelihood should be left to the debtor, which view is embodied in the laws of exemption from execution, which in this state are very liberal. The debtor's earnings for thirty days prior to the levy of a writ are exempt from seizure. The servant of the county is thus secured in his support, if he earns it, and the county is not liable to lose the services of competent officers. Indeed, it has never been observed that a county has difficulty in obtaining employes to do its work, and the county may surely obtain as good service from those who pay their debts as from those who avoid such payment, and are protected in the avoidance by the unsatisfying doctrine of public policy."

We think the time has come when this question should be re-examined in the light of modern conditions. Society has changed wonderfully since the days when the foundation of the doctrine of exemption of salaries was laid. And if the question should be re-examined, perhaps after all it would be concluded that the public service would not suffer, but would be benefited, by holding officers to the same accountability for their debts that other people are held to. The latest utterance on this question of the supreme court of Minnesota—a court that has perhaps been as steadfast as any in upholding the theory of official exemption—is significant. "It may, and probably is," remarks Justice Mitchell, "an open question whether, under existing conditions, the immunity of the salaries of public officers from legal process, benefits or injures the public service": *Orme v. Kingsley*, 73 Minn. 143, 72 Am. St. Rep. 614, 75 N. W. 1123.

II. Circumstances Affecting the Exemption.

a. **Character and Source of the Remuneration.**—The character of the salary of a public officer and the sources from which it is drawn, as affecting its exemption, are passed upon in *Sexton v. Brown*, 72 Minn. 371, 75 N. W. 600, where it is decided that the fees of a surveyor general of logs and lumber whose compensation consists of fees to be paid by those for whom he performs services, are not subject to garnishment. In the course of the opinion it is said: "The

decisions in those cases [*Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177; *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 61 Am. St. Rep. 395, 68 N. W. 606] do not rest upon any question as to the character of the garnishee or as to the source from which the officer receives his fees, but upon the ground that it is against public policy to permit the salary or compensation of a public officer for the performance of his official duties to be intercepted by garnishment or other legal process before the money reaches his hands, for the reason that it would tend to impair the efficiency of the public service. The reason applies with equal force, whether the compensation of the officer consists of a fixed salary or a scale of fees for specific purposes, and whether his compensation is payable directly out of the public treasury or by those for whom the services are immediately performed. The fact that his compensation is paid by particular parties for whom the services are performed, and the further fact that only a part of the public immediately require his services, do not render these services any the less public in their nature. The entire public has an interest in the proper performance of the duties of the office."

b. Time of Subjecting the Salary.—Although so long as the salary of a public officer is in the hands of disbursing agents of the government it is inviolable by legal process for the satisfaction of his debts, it becomes accessible to creditors after it comes into his possession or that of his agent. Then, appropriate process may be invoked against him, such as creditors' bills, proceedings supplementary to execution, and the like, for the purpose of subjecting the money: *Singer & Talcott Stone Co. v. Wheeler*, 6 Ill. App. 225; *Kennedy v. Aldridge*, 44 Ky. (5 B. Mon.) 141; *Blake v. Bolte*, 31 N. Y. Supp. 124, 10 Misc. Rep. 333. His investment of it in real estate does not render it exempt: *Dickinson v. Johnson*, 110 Ky. 236, ante, p. 434, 61 S. W. 267.

And after the expiration of the term of office, the exemption does not extend to fees which the officer thereafter earns. It was so decided in *Kepley v. Sheehan*, 9 Kan. App. 885, 61 Pac. 333. The following is an extract from the opinion: "The plaintiff in error contends that the fees of an ex-sheriff are exempt from seizure. There are many decisions holding that a public officer's salary or fees are so exempt, on account of public policy. We know of no authority for holding that such exemption extends to the fees earned by an officer after his term of office has expired, but it seems more reasonable to hold, as the reason for the rule exempting his fees has ceased to exist, the rule can no longer be available." One who has recovered a judgment against a town for official services cannot demand an exemption thereof from garnishment, when he has ceased to be an officer and the municipality waives its privilege of exemption: *Baird v. Rogers*, 95 Tenn. 492, 32 S. W. 630. But in *Orme v. Kingsley*, 73 Minn. 143, 72 Am. St. Rep. 614, 75 N. W. 1123,

it is held that the balance due of an officer's salary cannot be reached by proceedings supplementary to execution, notwithstanding his term of office has expired and he is no longer an officer.

According to some early New York decisions, the unearned salary of an officer cannot be reached by a creditor's bill, yet so much of it as is due at the time the bill is filed may be subjected: *McCoun v. Dorsheimer*, 1 Clarke Ch. 144; *Thompson v. Nixon*, 3 Edw. Ch. 457; *Smith v. —*, 4 Edw. Ch. 653; *Browning v. Bettis*, 8 Paige, 568. These decisions are reviewed in the principal case (*ante*, p. 434). During the performance of a public work, funds set aside for the payment of the contractor cannot be subjected to the payment of his debts, for the completion of the contract might thereby be interfered with; but when the work is finished, there would seem no sufficient reason, unless perhaps the inconvenience to the city of garnishment or other proceedings, to justify holding exempt any balance due the contractor: *City of Laredo v. Nalle*, 65 Tex. 359; *Pringle v. Guild*, 118 Fed. 655.

c. Remedies Employed and Manner of Subjection.—In the great majority of cases where the exemption of the salaries of public officers has been upheld, the funds have been attempted to be subjected by attachment, garnishment, execution or proceedings supplementary thereto. Cases have arisen, however, in which the availability of equitable remedies has been tested. In *Riggin v. Hillard*, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402, it is held that a creditor's bill may be sustained to reach money due to the defendant from a county or other municipal corporation not subject to garnishment; and if the court can ascertain that no inconvenience will result to the public, it will require the defendant to assign his demand to a receiver to be collected for the benefit of the complainant. This decision finds support in *Clark v. Bert*, 2 Kan. App. 407, 42 Pac. 733; *Knight v. Nash*, 22 Minn. 452; *Pendleton v. Perkins*, 49 Mo. 565; but it is opposed to *Addyson Pipe Co. v. Chicago*, 170 Ill. 580, 48 N. E. 967. None of these cases, however, involve an officer's compensation, and therefore the principal ground of public policy for holding the money exempt is wanting. But in *Geist v. St. Louis*, 156 Mo. 643, 79 Am. St. Rep. 545, 57 S. W. 766, in which case the fund in question was an officer's salary, it is held that municipal corporations are not subject to process of garnishment, nor to suits by creditors' bill.

It will be remembered that in the principal case (*Dickson v. Johnson*, 110 Ky. 236, *ante*, p. 434, 61 S. W. 267), it is adjudged that public policy demands that the courts refuse to require any officer to set apart any portion of his salary for the payment of his debts, there being a constitutional provision that no officer except the governor shall be allowed over five thousand dollars compensation per annum. It was not contended that attachment or garnishment could be invoked, nor that the entire salary could be subjected; but it

was argued that a court of equity has the power, and that it should, by appropriate orders, compel the officer to set aside from time to time a reasonable portion of his salary for the payments of his debts—certainly not an unreasonable contention under the facts of the case.

d. Particular Statutory Enactments.—Statutory provisions authorizing a judge to require a judgment debtor to apply a part of his "income" to the payment of his debts are held not to apply to the unearned salary of a person in the public service: *Spencer v. Morris*, 67 N. J. L. 500, 51 Atl. 470. And it is held that a statute authorizing money to be attached "in the hands of an attorney at law, sheriff, or other officer," does not apply to the compensation of public officers in the hands of disbursing officers: *Pruitt v. Armstrong*, 56 Ala. 306. But a statute declaring that no money shall be paid to any person when he is owing the commonwealth and that when such a claim is presented it shall be credited upon the accounts of the public debtor, and payment made of any balance, applies to claims of public officers: *Stone v. Mayo*, 21 Ky. Law Rep. 1559, 55 S. W. 700.

Statutes having special reference to cities and counties will presently receive attention in their proper place.

III. Exemption of Particular Salaries.

a. Of State and United States Officers.—In the absence of a statutory declaration to the contrary, the salary of a state officer in the hands of a disbursing agent of the government cannot be subjected to the payment of his debts by garnishment: *Wicks v. Branch*, 12 Ala. 594; *McMeekin v. State*, 9 Ark. 553; *Farmers' Bank v. Ball*, 2 Penne. (Del.) 374, 46 Atl. 751; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 439, 18 Am. Dec. 194; *Wild v. Ferguson*, 23 La. Ann. 752; *Bank of Tennessee v. Dibrell*, 35 Tenn. (3 Sneed) 379; *Blair v. Marye*, 80 Va. 485. Such salary, it may be said in general, is not subject to any judicial process at the instance of creditors: *Simpson v. Turner*, 76 N. C. 115. And a like exemption exists in favor of an officer of the United States or of the District of Columbia: *Buchanan v. Alexander*, 4 How. 20; *Der v. Lubey*, 1 McAr. 187. The reason for this rule of law, as hereinbefore considered at length, is the preservation of the public service from impairment.

b. Of County, Town, and City Officers.

1. The General Rule.—And the same policy which secures the compensation of an officer of a state from interception by his creditors, exempts the salary of a city officer, while in the treasury of the municipality or in the possession of its disbursing agents, from execution, attachment, garnishment, or proceedings supplementary to execution: *Holt v. Experience*, 26 Ga. 113; *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Chaudet v. De Long*, 16 La. Ann. 399; *Mayor etc. of Baltimore v. Root*, 8 Md. 95, 63 Am. Dec. 692; *Roeller* Am. St. Rep., Vol. 96—29

v. Ames, 33 Minn. 132, 22 N. W. 177; Hawthorne v. St. Louis, 11 Mo. 59, 47 Am. Dec. 141; Fortune v. St. Louis, 23 Mo. 239; Memphis v. Laski, 9 Heisk. 511, 24 Am. Rep. 327; Baird v. Rogers, 95 Tenn. 492, 32 S. W. 630; Sanger Bros. v. Waco, 15 Tex. Civ. App. 424, 40 S. W. 549. Contra, Rodman v. Musselman, 75 Ky. (12 Bush) 354, 23 Am. Rep. 724. Thus the wages or salary of a police officer cannot be reached by a garnishment against the city: Mayor etc. of Mobile v. Rowland & Co., 26 Ala. 498; Triebel v. Colburn, 64 Ill. 376; and if it has been collected by his captain as a matter of convenience and as his agent, it cannot be reached in the hands of the captain by supplementary proceedings: Gray v. Ashley, 53 N. Y. Supp. 547, 24 Misc. Rep. 396. The wages of a city sanitary inspector, cannot be subjected by garnishment: Skewes v. Tennessee etc. R. R. Co., 124 Ala. 629, 82 Am. St. Rep. 214, 27 South. 435; and the wages due a member of the fire department cannot be reached by proceedings supplementary to execution: Sandwich Mfg. Co. v. Krake, 66 Minn. 110, 61 Am. St. Rep. 395, 68 N. W. 606. The official services of a mayor have been held to be labor performed, within the meaning of a statute declaring that no person summoned as trustee shall be charged as such on account of any labor performed by the debtor after service of the process or within fifteen days prior thereto: Robinson v. Aiken, 39 N. H. 211.

The salaries of county officers, if there is no controlling statute, enjoy a like immunity, and cannot be subjected to the satisfaction of the claims of creditors against the officials: Wallace v. Lawyer, 54 Ind. 501, 23 Am. Rep. 661; Webb v. McCauley, 67 Ky. (4 Bush) 8; Oliver, Finnie & Co. v. Athey, 79 Tenn. (11 Lea) 149. And the same is probably true of the salaries of town and parish officers: Dunbar v. Dinkgrave, 10 La. Ann. 545; Walker v. Cook, 129 Mass. 577.

2. Modification by Special Statutes.—Municipal corporations, unless the statutes are clearly to the contrary, are usually held not subject to attachment or garnishment for a debt due to a third person: Bank of Southwestern Ga. v. Mayor etc. of Americus, 92 Ga. 361, 17 S. E. 287; Dollar v. Allen-West Commission Co., 78 Miss. 274, 28 South. 876; St. Francis Levee Dist. v. Bodkin (Tenn.), 69 S. W. 270; monographic note to Leake v. Lacey, 51 Am. St. Rep. 114-121. Nor are counties: Boon County v. Keck, 31 Ark. 387; Ward v. County of Hanford, 12 Conn. 404; Dotterer v. Bowe, 84 Ga. 769, 11 S. E. 896; Sherman v. Shobe, 94 Tex. 126, 86 Am. St. Rep. 825, 58 S. W. 949; note to Leake v. Lacey, 51 Am. St. Rep. 114-121.

As to whether a city or a county is a "person" or "corporation" or "body corporate," within the meaning of attachment and garnishment laws, so as to alter this rule, the authorities are divided. Some authorities hold that it is not: Duval County v. Charleston Lumber Co. (Fla.), 33 South. 531 (a valuable case thoroughly considering the question); Wallace v. Lawyer, 54 Ind. 501, 23 Am. Rep. 661; Buffham v. Racine, 26 Wis. 449; note to Leake v. Lacey, 51

Am. St. Rep. 117. Other cases take a contrary view: *Bray v. Wallingford*, 20 Conn. 416; *Wales v. Muscatine*, 4 Iowa, 302; *Wilson v. Lewis*, 10 R. I. 285; *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 75 Am. St. Rep. 778, 33 S. E. 516. This question arose in *Newark v. Funk*, 15 Ohio St. 462, where the salary of a city officer was involved, and it was decided that a statute providing that any "claims or choses in action due or to be due" a judgment debtor, and all "money, goods, or effects" which he may have in the hands of "any person, body politic or corporate," may be subjected to the payment of the judgment—is broad enough to include a salary due from a municipal corporation to one of its officers. And under a somewhat similar statute, the salary of a county officer is held subject to garnishment in *Waterbury v. Board of Commissioners*, 10 Mont. 515, 24 Am. St. Rep. 67, 26 Pac. 1002.

But in *Lewis v. Denver*, 9 Colo. App. 328, 48 Pac. 317, it is decided, under a statute making municipal corporations subject to garnishment, that the salary of a city officer cannot be garnished. "The question therefore is," said the court, "not whether the city may be held as garnishee in any case, but whether the salary of one of its officers can be made the subject of garnishment. The reason for holding municipal corporations exempt from liability to process in garnishment, where the statutes are silent on the subject, and that for exempting the salaries of public officers from such process, are entirely different. The inconvenience and annoyance to the corporation, resulting from the institution of proceedings of that nature, are the grounds upon which the exemption of the municipality has been based. But the salary of a public officer is a provision made by the law for his maintenance and support during his term, to the end that, without anxiety concerning his means of subsistence, he may be able to devote himself entirely to the duties of his office, and the public thus have the full benefit of his knowledge and ability in the services he is selected to render. If he could be deprived of his means of support by the garnishment of his salary, presumptively his efficiency as an officer would be impaired, if not destroyed, and the public interests would suffer serious detriment."

This decision is followed in *Troy Laundry etc. Co. v. Denver*, 11 Colo. App. 368, 53 Pac. 256. It is contrary, however, to *City Council of Montgomery v. Van Dorn*, 41 Ala. 505, although that case is somewhat weakened, but not expressly overruled, by the subsequent case of *Pruitt v. Armstrong*, 56 Ala. 306.

In Massachusetts, cities, towns, and counties may be summoned by trustee process; and a county may be charged in such process for compensation due to a messenger having the care of the courthouse, under an appointment by the county commissioners at a fixed salary: *Adams v. Tyler*, 121 Mass. 380.

3. Waiver of the Immunity.—There is a conflict in the authorities as to whether a municipality may waive its exemption from garnishment. The question is answered affirmatively in *Board of*

Commissioners v. Bond, 3 Colo. 411; Clapp v. Walker, 25 Iowa, 315; and in Baird v. Rogers, 95 Tenn. 492, 32 S. W. 630, it seems to be recognized that this exemption may be waived when the fund involved is an officer's salary. But the supreme court of Alabama holds that a municipality cannot waive its exemption from garnishment proceedings: Porter & Blair Hardware Co. v. Perdue, 105 Ala. 293, 53 Am. St. Rep. 124, 16 South. 713. And the supreme court of Utah holds that a municipality cannot waive its exemption by an ordinance consenting that money in its hands due as wages and salaries to employes may be attached under garnishee process in actions between private persons: Van Coit v. Pratt, 11 Utah, 209, 39 Pac. 827.

c. Of School Teachers and Superintendents.—Money in the hands of school trustees or of their treasurer due to teachers for services rendered in the public schools has generally been considered exempt from the demands of creditors of the teachers and not subject to attachment or other legal process: Hightower v. Slaton, 54 Ga. 108, 21 Am. Rep. 273; Millison v. Fisk, 43 Ill. 112; Bivens v. Harper, 59 Ill. 21; Allen v. Russell, 78 Ky. 105; Norton v. Soule, 75 Me. 385; School District v. Gage, 39 Mich. 484, 33 Am. Rep. 421; Ross v. Allen, 10 N. H. 96; Bulkley v. Eckert, 3 Pa. St. 368, 45 Am. Dec. 650; Spencer v. School District, 11 R. I. 537; monographic note to Leake v. Lacey, 51 Am. St. Rep. 120, 121; 1 Freeman on Executions, 3d ed., sec. 132, p. 132. There is a contrary holding, however, in Seymour v. Over-River School Dist., 53 Conn. 502, 3 Atl. 552. And it has been held that this rule of exemption is not altered by a statute authorizing the garnishment of municipal corporations: Chamberlain v. Watters, 10 Utah, 298, 37 Pac. 566. But see Whalen v. Harrison, 11 Mont. 63, 27 Pac. 384.

And the salary of a county superintendent of schools, like that of a teacher, enjoys an immunity from subjection to his debts, and for a like reason—namely, that the rights of individual creditors must yield to the higher rights of the public to have its institutions and servants perform their functions without interference in favor of merely private rights: Heilbronner v. Posey, 103 Ky. 462, 45 S. W. 505.

DAMRON v. COMMONWEALTH.

[110 Ky. 268, 61 S. W. 459.]

INFANT—Misrepresentation as to Age—Estoppel to Disaffirm Deed.—If an infant, by a deed reciting the purpose for which it is made, conveys land to make his grantee acceptable to the court as a surety on a bail bond, but before doing so testifies that he is of age, he is estopped, on reaching his majority, to disaffirm the conveyance, and one to whom he transfers the land in his attempt to disaffirm takes it at the risk of his right to do so. (p. 454.)

James Andrew Scott, for the appellant.

Morrison Breckinridge and Robert J. Breckinridge, attorney general, for the commonwealth.

270 PAYNTER, C. J. One Harrison Combs was indicted in the Boyd circuit court, and permitted to give bond in the sum of five hundred and fifty dollars. The title to the property here in question was in John Combs, Jr. He desired to become surety for his brother Harrison, but the court would not accept him for reasons not necessary here to state. To make John Combs, Sr., a good bondsman, he conveyed to him the property, reciting in the deed the purposes for which it was conveyed to him. The circuit judge would not accept John Combs, Sr., as surety unless there was stated in the deed the purpose for which John Combs, Jr., conveyed him the property. This **271** deed was duly recorded. The bond was forfeited, and the commonwealth had an execution levied upon the property, had it sold, and instituted this proceeding to recover the possession of it. It appears from the testimony in the case that John Combs, Jr., was about twenty years of age when he made the deed, and upon arrival at age, for the recited consideration of seventy-five dollars (although the property was worth over five hundred dollars), he conveyed it to the appellant, Wayne Damron, Sr. It is insisted here that John Combs, Jr., being a minor at the time he made the deed, could disaffirm the contract, and that the deed to Damron amounted to a disaffirmance of it. That a minor can usually disaffirm contracts which he makes on arriving at twenty-one years of age is not a debatable question, because his right to do so is generally recognized. It is equally certain that the deed to Damron, if he had the right to disaffirm under the facts of this case, would amount to it. The right of a minor to generally disaffirm a contract is not involved here, but the question

is, under the facts of this case, Was he estopped to do so? Before the circuit court would consider the question of allowing John Combs, Jr., to convey the property to John Combs, Sr., with a view of making him a good bondsman, he was required to testify as to his age, and in open court testified that he was over twenty-one years of age. If this court held that he should be permitted to disaffirm his contract, then it would allow him to perpetrate a fraud upon John Combs, Sr., and the commonwealth. That an infant must restore the property which he obtains in a contract before he can avoid it is the universal rule where he has been guilty of deceit or fraud: *Petty v. Roberts*, 7 Bush, 411. Here the infant received no property, and, of course, has none to restore. The only thing that he ²⁷² could have done in compliance with his contract would have been to pay the forfeited bond. In *Schmitheimer v. Eiseman*, 7 Bush, 298, it appeared the deed was made by an infant feme covert. She sought to avoid it on the ground of her infancy. The facts appeared to be that, in order to induce the purchaser of her property to accept a deed, and pay for it, she made an oath before a notary public that to the best of her knowledge and information she was more than twenty-one years of age. The court held that she was not entitled to recover the property, and said: "Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor femes covert are privileged to practice frauds upon innocent persons." We are aware that in some jurisdictions the contrary view is taken, but we believe in most jurisdictions the rule is announced as in the case above cited. However, it is unnecessary to review the opinions of the courts of other states on this question, as we will follow the rule of this court. We would not hold in all cases that, if an infant testified that he was twenty-one years of age, the party who dealt with him by reason of that fact would be protected. It might be so manifest that an infant was not twenty-one years of age that the party could not claim to have been deceived by his statement; hence no fraud would have been practiced upon him. Damron is in no better condition to question the validity of the deed than his vendor. As we have said, the deed recited the consideration for the conveyance; hence, he had notice of the terms of the contract between the parties. When Combs attempted to disaffirm the contract, Damron took the risk of his right to do so.

The judgment is affirmed.

On the Right of an Infant in general to disaffirm his deed upon becoming of age, see *Shipp v. McKee*, 80 Miss. 741, 92 Am. St. Rep. 616, 31 South. 197, 32 South. 281; *United States Investment Corp. v. Ulrickson*, 84 Minn. 14, 87 Am. St. Rep. 326, 86 N. W. 613. It has been held that this right may be exercised, notwithstanding he represented himself to be of age at the time of the execution of the deed: *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040. See the discussion of this aspect of the question in the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 633-637.

ILLINOIS CENTRAL RAILROAD COMPANY v. JOSEY.

[110 Ky. 342, 61 S. W. 703.]

RAILROADS—Fellow-servants.—The Foreman of a Section Crew who directs the movements of his force and has charge and control of the handcar on which they are riding, is not a fellow-servant with the men, and if he negligently applies the brakes, throwing one of them from the car, the master is answerable. (p. 457.)

RAILROADS—Contributory Negligence of Employé on Handcar.—If a section foreman negligently applies the brakes to a handcar on which he and his crew are riding, throwing one of the men from the car, it is no defense to an action against the company therefor that the man was standing up without any support, when the foreman could see his position, and know his peril if the car should be suddenly checked. (pp. 457, 458.)

DEATH—Punitive and Compensatory Damages.—An administrator is entitled to compensatory damages if the death of his intestate results from negligence, and to punitive damages if it results from gross negligence. (p. 458.)

APPEAL—Review of Misconduct in Argument.—If the bill of exceptions does not show what counsel said, the appellate court cannot consider whether or not his argument before the jury was objectionable. (p. 458.)

Johnson & Wickliffe and Pirtle & Trabue, for the appellant.

Charles Eaves, for the appellee.

341 PAYNTER, C. J. F. M. Josey was a section hand employed by the appellant, being one of the force of which G. W. Gayle was foreman or boss. One of the duties of the section foreman and such of his force as he desired to aid him was to go over the section on certain days to ascertain whether any stock had been killed along the line of the road, and see the condition of the track. To accomplish this it was necessary to go on a handcar, which the appellant furnished for that purpose. In July, 1898, Gayle took a number of his sectionmen, together with Josey, and started along the line to perform the duty men-

tioned above. Some of the men rode on the rear end of the car, with their faces in the direction it was moving, and others with their backs in that direction. Among the latter was Josey. The car was moving down grade at a pretty rapid rate of speed, when, as the testimony of appellee conduces to show, foreman Gayle unnecessarily put his foot upon a lever which applied the brakes to the wheels, thus causing the car to suddenly check its speed, throwing Josey in front of it, and it passed over his body, inflicting injuries from which he shortly thereafter died. The testimony introduced by plaintiff conduces to show that the foreman gave no warning of his intention to apply the brakes to stop the car. The defendant sought to show that deceased fell off of the car by reason of his own carelessness and negligence, and thus lost his life, and that the foreman did not apply the brakes until the deceased was in the act of falling off of the car, and it was done in an effort to prevent it from passing 345 over him. The defendant sought to show that the deceased fell off of the car because he did not have hold of the lever which was used in propelling it. The court, in instructions, submitted the questions at issue to the jury, and it could not have found against the appellant except upon the idea that Gayle applied the brakes to the wheels of the car, thus causing a sudden stop, and consequently threw the deceased therefrom, which resulted in the loss of his life.

Counsel for appellant urge in argument that, when a superior is engaged with an inferior servant in performing services ordinarily performed by the latter, he becomes a fellow-servant, and the master is not liable for his negligence; that the same person may in some things be a superior, and in others a fellow-servant, and in the latter event the master is not liable for injuries caused by his negligence. If the principle contended for by counsel is conceded to be correct, still it has no application to this case. The section foreman, Gayle, directed the movements of his force. He determined when the car should be placed upon the track and the place where it should be stopped. His duty placed him on the car, where he was when this accident occurred; and, furthermore, it was his duty to manage and control the brakes. He was not performing the duty of one of the section-men in manipulating the brakes of the car, thus controlling its movements, but was performing the duty imposed upon him by reason of the fact that he was foreman of the crew, directing and controlling their movements, as well as the car. He controlled the brakes on that car as an engineer upon a locomotive

engine does the airbrakes upon a train. While it is not done by steam, as in the former case, he supplied the force which applied the brakes to the wheels of the car. When a fireman is present performing his duties on ³⁴⁶ the engine by supplying it with fuel, thus generating the steam which propels the engine, and makes it possible for the engineer to control the movement of the train by applying the brakes, the relation of fellow-servant does not exist between them; and, if the engineer should negligently apply the brakes, and cause the train to give a sudden movement, throwing the fireman from the engine, certainly no one would contend that the master was not responsible for the negligent act of the engineer. In such case he is not the fellow-servant of the fireman; neither was the foreman of the section crew the fellow-servant of the deceased. Counsel for appellant cite the case of *Railroad Co. v. Gann* (Tenn.), 47 S. W. 493, in support of their position. That is a case of the Tennessee supreme court, which recognizes that the foreman of a section crew is not the fellow-servant of the sectionmen. The facts of that case were substantially the same as in this case, and the court there held that, although the foreman was not the fellow-servant of the sectionmen, still, as he was performing a service ordinarily performed by sectionmen, he became a fellow-servant. The facts of that case show that it was the duty of the foreman to manipulate the brakes of the handcar, and control its movements, as well as direct the men in charge of it. We fail to understand, in view of those facts, how the court concluded that the section foreman was performing a service ordinarily performed by one of the inferior servants. Under the facts of that case the court, in our opinion, erroneously reached the conclusion that the foreman was performing a service ordinarily performed by a fellow-servant. In that as in this case he was performing a duty which was imposed upon him by reason of the fact that he had charge of the force and of the handcar, the brakes of which it was his peculiar duty to manipulate. ³⁴⁷ In the case of *Illinois Cent. R. R. Co. v. Coleman* (Ky.), 59 S. W. 13, this court held that a yardmaster was not a fellow-servant of one of the servants employed in the yard when he was assisting that servant in the manipulation of car couplings.

It is urged that the deceased was negligent in not supporting himself by holding to the lever on the car while it was traveling at the rate of speed it was when the accident happened. The testimony offered by the defendant tends to show that he was not thus supporting himself. In our opinion instead of

that testimony aiding the defendant, it had the contrary effect. If he was standing upon the handcar without any support, then the greater reason why the section foreman should not have applied the brakes to the car so as to suddenly check its speed. The foreman could see his position, and must have known the peril in which he would be placed if the car was suddenly checked. According to the testimony of all the witnesses in this case, there was no occasion for stopping the car at the place where the accident happened. The appellant did not endeavor to show that it was necessary to apply the brakes at that place, except in an effort to protect the deceased when he was discovered falling from the car.

The instructions which the court gave the jury were more favorable to the defendant than it was entitled to receive. Under them the plaintiff could only recover compensatory damages by showing gross negligence. The administratrix was entitled to compensatory damages if the death resulted from negligence, and to punitive damages if it was the result of gross negligence: Ky. Stats., c. 1, sec. 6. There are many decisions of this court to that effect. It is only by virtue of the constitution and the statute that there can be a recovery of damages ³⁴⁸ for the loss of life occasioned by negligence. If the accident had not resulted in Josey's death, and he had sustained injuries thereby, he could have maintained his action by showing that it was the result of gross negligence. This peculiar condition of the law results from the facts that the right of action for the loss of life is given by the constitution and statute, and the other right to recover for injuries exists at common law.

Counsel urge that the case should be reversed because of objectionable argument or language employed by counsel for appellee on the argument of the case before the jury. The bill of exceptions does not even show what counsel said in arguing the case before the jury; hence there is nothing for the court to consider in respect to that matter. The judgment is affirmed.

Petition of appellant for modification of judgment overruled.

Fellow-servants.—The tests by which to determine whether or not an employé is a fellow-servant are stated in *McLaine v. Head & Dow St. Co.*, 71 N. H. 294, 93 Am. St. Rep. 522, 52 Atl. 545; monographic note to *Fox v. Sanford*, 67 Am. Dec. 588-597. As to whether a foreman is a fellow-servant with the men under him, see *Downey v. Gemini Min. Co.*, 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *Wellston Coal Co. v. Smith*, 65 Ohio St. 71, 87 Am. St. Rep. 547, 61 N. E. 143; monographic note to *Mast v. Kern*, 75 Am. St. Rep. 613-621. And as to whether a section boss or foreman is

a fellow-servant with the members of his crew, see the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 632-634; *St. Louis etc. Ry. Co. v. Touhey*, 67 Ark. 209, 77 Am. St. Rep. 109, 54 S. W. 577. A railway engineer and brakeman have been held to be fellow-servants, *Brewster v. Chicago etc. Ry. Co.*, 114 Iowa, 144, 89 Am. St. Rep. 348, 86 N. W. 221.

BECKER v. LOUISVILLE AND NORTHERN R. R. CO.

[110 Ky. 474, 61 S. W. 997.]

RAILROAD TRACK—Negligence in Rescuing Person on.—If a train approaches when two persons are crossing a railroad bridge, and, as they are attempting to reach the other end, one falls between the ties, it is the legal right of the other to remain with and seek to rescue his companion, and in doing so he is not guilty of contributory negligence. (p. 461.)

RAILROAD TRACK—Duty to Trespasser on.—If the engineer on an approaching train sees a person on a railroad bridge, whose only means of escape is to reach the end of the bridge, he must give such person ample time to cross in safety. (p. 462.)

Robert Harding, John W. Rawlings and Emmet V. Puryear, for the appellant.

Charles R. McDowell and J. W. Alcorn, for the appellee.

477 GUFFY, J. It is substantially alleged in the petition that one Mary Vanarsdale, an infant between twelve and fourteen years of age, was upon the railroad bridge of the defendant at said time and place, and in front of said approaching train, and in great danger and peril of being run over by said train, and was placed in said danger and peril aforesaid by the gross negligence of defendant in failing to slacken said speed of said train after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in failing to stop said train after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in the operation of said train after it became aware of her presence thereon, and that defendant became aware of her presence on said bridge in ample time to slacken the speed of said train to avoid running over and upon her and relieve her of said danger and peril. It is further alleged that plaintiff, Becker, undertook to rescue the said Vanarsdale from her peril and danger, and to enable her to escape from being killed by said train by the gross negligence of defendant, and in his efforts to rescue said Vanarsdale, and

while he was endeavoring to do so, the train ran over him, knocking him from said bridge, and permanently injuring him, to the damage of five thousand dollars, for which he prayed judgment. ⁴⁷⁸ The answer denies that on the occasion mentioned it could have slackened the speed of its train any more than it did after it became aware of the presence of said Vanarsdale and plaintiff, or that after it became aware of their presence on the bridge it could have avoided running over them. Denies any negligence at all. The answer may also be treated as pleading contributory negligence upon the part of the plaintiff. It is also pleaded that neither plaintiff nor Vanarsdale had any right to be upon the bridge in question. The affirmative averments of the answer were properly denied by reply. After the pleadings were made up, and various motions disposed of, which we deem it unnecessary to notice, the trial was entered into; and at the conclusion of plaintiff's testimony the court, upon motion of defendant, instructed the jury peremptorily to find for the defendant, which was accordingly done. And, plaintiff's motion for a new trial having been overruled, he prosecutes this appeal.

The sole question presented for decision is whether the plaintiff was entitled to have the case submitted to the jury, or, in other words, was there sufficient evidence from which the jury might find a verdict for the plaintiff? It appears from the evidence in this case that five children—to wit, Ed Hunn, Katie Hood, Lillie Owens, Mary Vanarsdale, and plaintiff, the ages of whom are about as follows: Lillie Owens, between eight and nine; Ed Hunn, in his fourteenth year; Kate Hood, about fifteen; Mary Vanarsdale, between twelve and thirteen; and the plaintiff, in his fourteenth year—had gone to the creek for the purpose of fishing, and, not being satisfied with the first point they reached, decided to go to another place, and, to reach it, decided to cross the creek on the railroad bridge, and while crossing it they heard or by some means became aware of the ⁴⁷⁹ approaching freight train, and at once made an effort to get out of the way of the train, by continuing to cross the bridge to the other side of the creek. Three of the party escaped, but Miss Vanarsdale, it seems, fell through between the ties or bars of the bridge; and the plaintiff, who seems to have been her escort, sought to rescue her, and perhaps pulled her up once out of the opening in which she had fallen, but she again fell into another, and as the result of this delay she was killed, and the plaintiff suffered the injuries sued for in this action.

It is the contention of appellee that plaintiff had no right to be on the bridge, and that it owed him no duty until after it discovered his peril, which it claims it did not do in time to avoid the injury; also that he was guilty of such contributory negligence as to bar his right to recover. It is evident that it was the legal right as well as the moral duty of the plaintiff to remain with and seek to rescue his companion, and, so far as that question is concerned, the law seems to be well settled that he was not guilty of any contributory negligence for remaining on the said bridge for the purpose of saving the life of his companion.

It is the contention of appellant that the defendant or its agents discovered those parties upon the bridge in ample time to have slackened the speed of the train so as to enable the plaintiff to have avoided the danger. The evidence conduces to show that the engineer could see the whole bridge from a distance of nine hundred and sixty feet, and one standing on the track at the bluff can see the whole length of the bridge for three hundred and twenty yards; that a man in the cab could see the bridge one hundred and twenty feet farther back. The proof also conduces to show that a man in the cab could see the bridge one hundred and twenty feet farther back than if on the ground. It is also evident from the proof that for a considerable distance from the ⁴⁸⁰ bridge it is upgrade in reaching the bridge in question. There is also some proof tending to show that some one on the engine was seen to put his head out, as if looking toward the bridge, at some distance from it. It seems to us, from the evidence, that the jury were authorized to believe and to have found that the defendant's agents and servants saw those children upon the bridge in ample time to have so slackened the speed of the train as to enable them to have escaped the danger. There is hardly room to doubt this, from the map and evidence filed in this action. It is not at all reasonable to suppose that the defendant, if it had a right to do so, was indifferent as to the condition of the bridge it had to cross. It can hardly be presumed that the defendant would not feel enough of interest in its own train and those aboard to risk running on the bridge without looking to see whether the bridge was in a condition to be crossed in safety to the crew, and if the defendant was on the lookout it must have seen those children in time to have slackened the speed of the train and thus have prevented the injury. The reasonable conclusion is that the children were seen, but the defendant supposed that they had ample time to complete the

crossing of the bridge and thus escape injury, which the proof evidently shows they would have done but for the misfortune of Miss Vanarsdale in falling between the ties or bars of the bridge. If it be conceded that the plaintiff was a trespasser, and that defendant owed him no duty except to protect him after discovering his peril, it is clear that when discovered upon the bridge the defendant should have given him ample time to have escaped. If he had simply been on the railroad track in the open country, it might be said that defendant had a right to presume that he would step off the track and get out of the way of the ⁴⁸¹ train; but if a party having started to cross a bridge of as much length as the one under consideration, had no means of escape except to reach the termination of the bridge, common humanity demands that, even if a trespasser, he should not be wantonly run over, but should have a reasonable chance to cross the bridge in safety. A few minutes' delay of the train would have saved plaintiff the great personal injury which he suffered in the vain attempt to save the life of the little girl with him. It is said in section 483 of 2 Shearman and Redfield on Negligence: "The rule stated in section 99, that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant, after becoming chargeable with notice of the plaintiff's danger, failed to use ordinary care to avoid injuring him, has been enforced in many railroad cases. . . . Thus, a locomotive engineer or motorman, after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to anticipating injury before it becomes imminent, and the utmost care and diligence of which he is personally capable after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train, and will step off the track in ample time to avoid all danger without any diminution of the speed of the train. These rules apply to all cases, even of the most outrageous negligence on the part of a person ⁴⁸² on the track—as, for example, where a person attempts to cross in the very front of a train, or where children or drunkards have actually fallen asleep, lying across the rails. If the engineer becomes aware of anything

lying upon or dangerously near the track, which may possibly be a human being or a valuable animal, he is bound to check the speed of his train so as to enable him to stop in time to avoid injury; and, if injury ensues from his neglect to do this, his sincere belief that the object was worthless is of no defense. In general, an engineer has the right to assume that a person walking upon the track is free to act, and is in possession of all ordinary faculties, and will therefore act with ordinary prudence; but, when the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution, and to check or even stop the train, as may be necessary. So, where he sees a little child upon the track, he has no right to assume that the child will use the same discretion for its own protection as an older person would; and he must bring the speed of the train under control as quickly as possible, so as to be able to stop it altogether if the child does not appreciate its danger." In section 484 of 2 Shearman and Redfield on Negligence, it is said: "The rule stated in the last section, however, does not cover the whole ground. The defendant is responsible not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'willful,' or 'wanton,' or even grossly negligent are not sound. No courts have in actual practice adhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously stated it."

⁴⁸³ After a careful consideration of the evidence in this case, as well as the law applicable thereto, we are clearly of the opinion that the court erred in giving the peremptory instruction. The evidence made a prima facie case which would entitle plaintiff to recover. The judgment appealed from is therefore reversed, and the cause remanded, with directions to award plaintiff a new trial, and for proceedings consistent herewith.

Petition for rehearing filed by appellee and overruled.

Negligence in Rescuing Life.—The law has so high a regard for human life that it will not impute negligence to an effort to save it, unless made under such circumstances as to constitute rashness: See the monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 849; *Corbin v. Philadelphia*, 195 Pa. St. 461, 45 Atl. 1070, 78 Am. St. Rep. 825, and cases cited in the cross-reference note thereto; *West Chicago St. R. R. Co. v. Liderman*, 187 Ill. 463, 79 Am. St. Rep. 226, 58 N. E. 367. But see *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644.

Trespassers on Railroad Track.—It is the duty of the engineer on a railway train to keep a lookout for persons on the track, and, upon discovering anyone thereon, to use the utmost care to avoid injury to him: Note to Central R. R. Co. v. Vaughan, 30 Am. St. Rep. 54. And see especially Central R. R. etc. Co. v. Vaughan, 93 Ala. 209, 30 Am. St. Rep. 50, 9 South. 468. Consult, also, Purcell v. Chicago etc. Ry. Co., 109 Iowa, 629, 77 Am. St. Rep. 557, 80 N. W. 682; Highland etc. R. R. Co. v. Robbins, 124 Ala. 113, 82 Am. St. Rep. 153, 27 South. 422; Florida Cent. etc. R. R. Co. v. Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 338.

BREY v. HAGAN.

[110 Ky. 566, 62 S. W. 1.]

SURETY—Not Discharged by Adding Another Surety.—A surety on a note is not discharged by the addition before delivery, without his knowledge, of another name as surety, where such note was executed for the purpose of borrowing money thereon. (p. 465.)

Little & Little, for the appellant.

Wilfred Carrico, for the appellees.

568 WHITE, J. Appellant Brey instituted this action against N. G. Stanley, Sylvester Hagan, Thomas J. Hagan, and William M. McAllister on a note signed by all the parties for the sum of thirteen hundred and eighty-four dollars and nineteen cents. Appellees McAllister and the Hagans filed answers presenting the issue of a material alteration in the note, and pleading that by reason of such alteration the note is void as to them, all being sureties of Stanley. The facts of alteration as pleaded are that the note was a renewal of a former note of Stanley, and was first signed by Stanley and Sylvester Hagan and delivered to and accepted by appellant, and subsequently, without the knowledge or consent of Sylvester Hagan, the signature of Thomas J. Hagan was also procured to the note, when it was again delivered to and accepted by appellant, and that subsequently to this the signature of McAllister was procured to the note without the knowledge or consent of either of the Hagans, when it was redelivered to and accepted by appellant. This plea was denied, and on trial before the court without a jury the court found the facts as follows: "I find from the evidence the facts in this case to be that the note sued on was executed in renewal of a note theretofore held by plaintiff, executed by defendant Stanley and others for borrowed money. This note was prepared at the house of Stanley, and signed by him alone, and

given into the hands of plaintiff, with request by Stanley that he procure the name of Hagan to it as his surety. Brey did present the note to Hagan, with the request that he sign it as Stanley's surety, which he did. Nothing was said about others signing it, and Hagan knew nothing of the names added until the suit was brought on it. It was understood between Brey and Stanley that other sureties were to be added, and Brey sent ⁵⁶⁹ it back to Stanley for the additional names. He procured the additional name of Thomas J. Hagan, returned it to Brey, when he returned it again to Stanley for an additional name, which was procured—W. M. McAllister signing it as the fourth surety—when plaintiff accepted the note as satisfactory, and the old note was then given up. It appears that S. Hagan had no knowledge or notice of the latter signature." On these facts the trial court adjudged that both S. Hagan and Thomas J. Hagan were released, and because of their release McAllister was, also, and then rendered judgment in favor of these three defendants for costs; hence this appeal.

We are of opinion that the judgment rendered herein is erroneous, upon the facts found. The case of *Edwards v. Mattingly*, 107 Ky. 332, 53 S. W. 1032, 21 Ky. Law Rep. 1045, is decisive of this case. The court, by Mr. Justice Burnam, said: "These opinions [referring to *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652, *Shipp v. Suggett*, 9 B. Mon. 8, *Lilley v. Evans*, 3 B. Mon. 417, *Bank of Limestone v. Penick*, 5 T. B. Mon. 25, and *Puliam v. Withers*, 8 Dana, 98, 33 Am. Dec. 479] rested upon the principle of law that the delivery of the obligation to the payee, and the payment of the money thereon by him, consummated a contract between the parties, and any subsequent alteration of the contract which destroyed its identity and changed the evidence in respect to the transaction to which it related rendered it void, and that the adding of another obligor by the payee without the assent of those previously bound was such a material alteration of the obligation as to amount to a novation. But this court has never held, so far as we are advised, that the addition of another security to an obligation, which was executed for the express purpose of borrowing ⁵⁷⁰ money, before its delivery to the payee, even when done without the assent of parties previously bound thereon rendered such instrument void as to them; and there is no reason why it should have that effect. The addition of another security did not increase the liability of those already bound, and it can be reasonably presumed that the principal in such an obligation had im-

plied authority from the surety previously bound to consent to or secure such additional name, when necessary to effect the object for which the note was executed; and we are of opinion that such an addition may be made at any time before its final delivery to the payee, without invalidating it, provided it does not prejudicially affect the rights of persons who have executed it before such alteration." This expression of the court is applicable to, and decisive of, the question here. Upon the findings, the judgment should have been for appellant. Wherefore the judgment is reversed, and cause remanded for a new trial, and for proceedings consistent herewith.

Petition for rehearing by appellees overruled.

The Effect of the Addition of another surety on the liability of preceding sureties is discussed in the monographic note to Burgess v. Blake, 86 Am. St. Rep. 92-94. In Deposit Bank v. Peak, 110 Ky. 579, post, p. 466, 62 S. W. 268, it is held that one surety on a note cannot escape liability on the ground that he signed the instrument after it was delivered, when the payee did not accept it until so signed.

DEPOSIT BANK OF SULPHUR v. PEAK.

[110 Ky. 579, 62 S. W. 268.]

SURETY—Effect of His Signing Note After Delivery.—A surety on a note cannot escape liability on the ground that he signed the instrument after it was delivered, when the payee did not accept it until so signed. (p. 467.)

SURETIES—Evidence of Relative Wealth of.—If a father signs his son's note as surety, and after its delivery another surety signs it, the admission of evidence that the father is a wealthy man, while the other surety is comparatively poor, is prejudicial error, in an action to enforce the latter's liability. (p. 470.)

SURETIES.—The Only Liability as Between Cosureties is to divide, in proportion to their original liability, any indemnity received by their suretyship, and any damage necessarily sustained by it. (p. 471.)

SURETY, Payment of Liability by—When does not Affect Cosurety.—A surety on a note about whose liability, as between him and the payee, there is some question may, without legal objection from another surety, pay what would be his own part of the liability, in no wise interfering with the original liability of his cosurety. (p. 471.)

SURETY—Indemnity to as Affecting Cosurety.—If the payee of a note, upon the payment by one of the two sureties thereon of one-half of the amount for which he is legally bound, agrees in consideration of such payment—it being past due—to indemnify him

against having any further sum to pay, the agreement is not binding for want of consideration, and his cosurety is not thereby affected. (p. 472.)

John D. Carroll, for the appellant.

W. S. Pryor, for the appellee.

581 O'REAR, J. Appellee was sued, with J. C. Garriott and E. M. Garriott, upon a promissory note to appellant for eleven hundred and thirty-two dollars and twenty-four cents, dated August 8, 1892, maturing four months thereafter, with credit indorsed, "Interest paid to December 8, 1893, ninety dollars and fifty-seven cents." J. C. Garriott was the principal; the other two, sureties. J. C. is a son of E. M. Garriott. E. M. Garriott paid one-half the note after suit, and made no defense. J. C., the principal, is insolvent. Appellee pleaded numerous matters in defense, all of which were disallowed by the court, being held insufficient on demurrer, save three, as follows: 1. That when appellee signed the note it had been signed by the two Garriotts, and had been accepted by appellant, the bank, and there was therefore no consideration for his signature; 2. That after the maturity of the note the principal, J. C. Garriott, had more than enough money on deposit with appellant to pay the note, and it failed to apply same on the note, and thereby appellee was discharged; 3. That said principal had placed a lot of notes belonging to him with appellant for collection, with directions **582** to apply the proceeds, when collected, to his debts owing it, including the one sued on, and that this note should be credited by its proper proportion of the amounts collected. Of the other matters attempted to be interposed as defenses by appellant, and disallowed by the circuit court, but two are urged in argument here for appellee as having been improperly rejected. They are contained in the sixth and seventh paragraphs of the answer, and are as follows: In paragraph 6 he charges that E. M. Garriott, whose name was signed to the note as a surety when he signed it, was not in fact bound on the note, because he had been induced to sign a note of which it was a renewal by fraudulent misrepresentation of the bank to the effect that the debt was one represented by a note signed by his sons, J. C. and T. E. Garriott, when in fact it was but an overdraft by J. C. Garriott at the appellant bank, of which T. E. Garriott was the cashier. The seventh paragraph contained, in addition to the matter set up in the sixth, the further allegation that appellant sued E. M. Garriott on this note in the Trimble circuit court, and that

said E. M. Garriott filed his answer in that suit, pleading the above facts as discharging him from liability on the note sued on, and that thereupon appellant dismissed its action without prejudice, and that afterward appellant sued all the parties to the note in Henry county, the appellee being served with summons while there in the official discharge of his duty as commonwealth attorney in that district, and that thereafter appellant accepted of E. M. Garriott one-half of said note sued on, and certain persons, who were alleged to be officers of appellant bank, executed to said E. M. Garriott their individual obligation by which they undertook to indemnify him against having any further sum to pay on this ⁵⁸³ debt. Said paper is in the following words:

"Whereas, E. M. Garriott has this day executed to the Deposit Bank of Sulphur his promissory note for seven hundred and twenty-four (\$724.63) dollars and sixty-three cents, to pay one-half of a note due to said bank by J. C. Garriott, R. F. Peak, and E. M. Garriott; and, whereas, the bank will not release said E. M. Garriott from the balance of said note: Now in consideration of the execution of this note to said bank, we bind and obligate ourselves to said E. M. Garriott that, if he is compelled to pay any more of said J. C. Garriott note, that he will refund and pay to ——— the amount that he is required to pay on said note in excess of the amount he has this day paid by the execution of his note for \$724.63, which is to be applied on J. C. Garriott, etc., note.

"Witness our hands this December 8, 1898.

"J. T. ADAMS.

"PARK C. SMITH.

"T. E. GARRIOTT.

"C. R. MARTIN."

It was further alleged that said obligation was the obligation of the plaintiff (appellant), and that by reason of its execution appellant released said E. M. Garriott from liability on said note. Other allegations are made, but they are more in the form of argument and legal deduction than a pleading of substantive facts.

On the trial the evidence for appellee (he, of course, having the burden) in support of the first plea allowed by the court was, in substance, that J. C. Garriott, the principal, being required by the bank to renew the note, procured his father, E. M. Garriott, to sign it with him, telling him that another brother

would also sign it, but, instead, being in a hurry, he took the note to the bank and delivered it to the cashier, saying that appellee would sign it, and requesting the cashier to call appellee's attention to it. Appellee testified that the cashier called him ⁵⁸⁴ into the bank some time in October or November, and told him that J. C. Garriott had said he would sign that note and presented it to him, and that he did sign it without asking any question, or holding further conversation. This appears to have been some days—at least, some time—after the first names had been signed, but it also appeared that the note bore an earlier date than that of its actual execution, to correspond with the date of the maturity of the one for which it was to be in renewal. On the second ground of defense, there was no evidence on appellee's showing, nor any evidence in fact, that J. C. Garriott ever had on deposit in the bank, after the maturity of the note, a sum as much even as half of the note sued on, or any considerable amount. On the third ground, the only evidence to support it was the testimony of J. C. Garriott that he had deposited a number of notes—names, amounts, and dates not recalled, though he gave the names of some of the obligors, and approximated the amounts owing by them—with the bank, as collateral for his indebtedness to the bank; that his recollection was that these notes amounted to from two thousand five hundred dollars to three thousand three hundred dollars—something more than his indebtedness to the bank. He did not know how much had been collected, nor did he say how much was collectible. On all the evidence, we cannot say that there was enough to justify a submission of the case to the jury. The peremptory instruction should have been given, but was overruled. Appellant's evidence showed conclusively that the note had not been accepted by the bank till signed by appellee, that at no time did J. C. Garriott have any sum of money on deposit in appellant bank after the maturity of the note approaching as much as half the amount of the note sued on, and that the notes left as collateral had been collected, so far as ⁵⁸⁵ collectible, and applied on other unsecured debts owing the bank by J. C. Garriott, upon which they were expressly placed as collateral, and that some few dollars remained, which was placed to his credit on deposit, and that interest on the note was paid by charging it up to this account. The jury returned a verdict for appellee. In our opinion, there was not sufficient evidence to sustain the verdict, and it is so flagrantly against the weight of the evidence as to appear at first glance to have been given under the influence of prejudice or passion, and should have been set aside.

On the trial appellee was permitted to prove, over appellant's objection, that appellee was comparatively a poor man, his whole estate subject to execution, being his home in Shelbyville, worth some two thousand five hundred dollars after deducting encumbrances, and perhaps an equity in some other real property of no great value, all probably acquired since the creation of appellee's liability, and that E. M. Garriott was a wealthy man—that is, was worth, anyhow, from ten to fifteen thousand dollars—and that the cashier of appellant bank was his son. The only possible theory upon which the foregoing was admitted as relevant was to show that the bank had in fact accepted the note before appellee signed it, and that, therefore, as to appellee, it was without consideration; for it was probably supposed the bank would accept a solvent note without reference to, or waiting for the signature of, an insolvent surety. On the contrary, the effect of the testimony on this line must have had the contrary legal effect; for allowing another to sign after the obligation had become complete might operate to release the surety who had signed, because of the consequent change of the contract between the bank and him, and therefore the evidence would more strongly ⁵⁸⁶ rebut than support the presumption first supposed. But, to our minds, the most natural effect of this evidence was to lead the attention of the jury to the consideration of the ethical relation of these parties as among themselves; that is, that it was more just to require the bank, whose cashier was the brother of the principal, to look to the father of the principal, who was rich and old, and would soon doubtless be distributing his estate among his children, to pay the whole of this debt, rather than to collect half of it from a justly popular, struggling, poor, and rising young attorney, whose recent preferment marked the esteem in which those trying the case and his other neighbors bore him. The evidence must have been highly prejudicial to appellant, as tending to distract the jury's attention from the pure legal question involved, to the solution of a sentimental one in its stead.

As from the foregoing it is apparent that the case must be returned to the lower court for a retrial, it is proper to here consider the legal value of the pleas made in paragraphs 6 and 7 of appellee's answer, and disallowed by the court. The effect of these pleas is, if allowed, to permit appellee to plead for his cosurety a defense personal to the latter, and of which he declines, for whatever reason, to avail himself. That appellee

could rely on any defense of the principal is without question. Why? Because he has engaged to be answerable only for the legal liability of the principal on the undertaking. Therefore anything that gave the principal legal release is good as the surety's defense. But is such his liability to his cosurety? The only liabilities to the cosurety, independent of special agreement as between themselves, were not of contract, but are imposed by the law; that is, to divide, in proportion to their original liability, any indemnity ⁵⁸⁷ received by their suretyship, and any damage necessarily sustained by it; that is, so much of the principal's debt as they may be required to assume: Daniel on Negotiable Instruments, sec. 1341. We are of opinion, furthermore, that the matter set up for E. M. Garriott's defense would not have availed said E. M., because it does not appear to us that the alleged misrepresentation was of a material fact. That it was the debt of J. C. Garriott which was being secured is conceded. We cannot see that it is material whether that debt was formerly an overdraft or a note. That T. E. Garriott, the cashier, is alleged to have been bound on the original debt as surety, cannot be deemed a material fact; for it was not alleged that T. E. was to become again bound on the debt if E. M. did not sign the note, or that E. M. executed it in consideration of T. E.'s release, and that J. C. Garriott, the principal, was then insolvent. In other words, the facts pleaded fail to show that either the bank or T. E. Garriott gained anything, or that their alleged position with reference to probable loss on account of J. C.'s state of solvency was in any wise changed or affected by the fact alleged to have been misrepresented to E. M. Garriott. The consideration of E. M. Garriott's signature was the future forbearance of an overdue draft of his son J. C. Garriott. Whether the form of debt of which this was a renewal had been secured by a personal surety or not does not appear to us to any wise affect the undertaking that E. M. Garriott, the new surety, was assuming. But whether the cosurety, though not legally bound, could by paying the whole debt thereby make the other surety liable to contribute to him one-half, certainly the one about whose liability, as between him and the payee, there was some question may, without legal ground of objection ⁵⁸⁸ from another surety, pay what would be his own part of the liability, in no wise interfering with or adding to the original liability of his cosurety as contemplated and agreed to by the latter when he signed the paper. And that such surety did so pay cannot have prejudiced any right of the surety who had

paid nothing: *Houch v. Graham*, 106 Ind. 195, 55 Am. Rep. 727; *Bowser v. Rendell*, 31 Ind. 128.

So far as the paper executed by Adams and others, and charged to be the act of the bank, is concerned, we are of the opinion that it is invalid as a defense to appellee, for at least two reasons: 1. It does not appear to be the act of the bank, but the act of the parties who signed it, as their individual undertaking; nor is it alleged that the bank had agreed with them, for a consideration, to assume the obligation, or that it authorized them to so obligate it; 2. If it is the act of the bank, and could be so treated, then it appears to be without consideration; for E. M. Garriot having paid but one-half of the sum for which he appears legally bound, the obligee's agreement, in consideration of such payment—it being past due—to release him from the residue, is not of binding force, for there would be no consideration to support it. From the foregoing it follows that the circuit court did not err in sustaining the demurrers to the paragraphs named, but that it did err in admitting the testimony criticised herein, as well as in not giving the peremptory instruction asked for. The judgment is reversed, and the cause remanded for proceedings consistent herewith.

The Addition of a New Surety as affecting the other sureties is considered in the monographic note to *Burgess v. Blake*, 86 Am. St. Rep. 92-94. It is held in *Brey v. Hagan*, 110 Ky. 566, ante, p. 464, 62 S. W. 1, that a surety on a note is not discharged by the addition without his knowledge of another name as surety before delivery.

TOMPKINS v. TRIPLETT.

[110 Ky. 824, 62 S. W. 1021.]

SURETYSHIP—Married Woman's Contract of.—In Kentucky a married woman's estate cannot be subjected to the payment of a liability upon a contract to answer for the debt, default, or misdoing of another, including her husband, unless such estate has been set aside for that purpose by conveyance. (p. 473.)

SURETYSHIP—Parol Evidence that Obligor is Only Surety.—An obligor may introduce parol evidence to show that he is only surety on a writing which is a joint and several obligation. (p. 473.)

SURETYSHIP—Note Signed by Wife as Principal and Delivered by Husband.—If a wife makes her husband agent to deliver a note signed by both, her signature appearing first, she is bound by his representation to the payee that she is principal. (p. 474.)

Sweeney, Ellis & Sweeney, for the appellant.

George V. Triplett, for the appellees.

§25 PAYNTER, C. J. This action is based upon a writing in figures and words as follows:

"\$250.00.

Owensboro, Ky., March 22, 1895.

"For value received, six months after date we promise to pay to the order of A. C. Tompkins two hundred and fifty dollars, with interest at the rate of six (6) per cent per annum until paid.

NANNIE B. TRIPLETT.

"GEORGE V. TRIPLETT."

Nannie B. Triplett is the wife of her co-obligor, George V. Triplett, and was at the time the note was executed. Her defense to the action is that she was a married woman at the time it was executed; **§26** that she was only surety on the note, and therefore it is not enforceable against her. The appellant replied that she was the principal in the note, and that the money was loaned on the faith that she was the principal. The facts are: George V. Triplett applied to the appellant for the loan of two hundred and fifty dollars. He refused to loan it to him, but told him that he would loan it to his wife. Thereupon Triplett procured his wife's signature to the note, and delivered it to appellant. Under our statute, a wife's estate cannot be subjected to the payment of a liability upon a contract, after marriage, to answer for the debt, default, or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance: Ky. Stats., sec. 2127. This court, in *Lewis v. Harbin*, 5 B. Mon. 564, *Emmons v. Overton*, 18 B. Mon. 648, *First Nat. Bank v. Gaines*, 87 Ky. 601, 9 S. W. 396, *Skinner v. Lynn*, 21 Ky. Law Rep. 185, 51 S. W. 167, holds that, on a writing which is a joint and several obligation, an obligor may introduce parol testimony to show he is only surety, the reason therefor being that such testimony does not have the effect of contradicting it. This rule applies to actions by obligees against obligors. In *Crumbaugh v. Postell*, 20 Ky. Law Rep. 1366, 49 S. W. 334, it appeared that the husband, Crumbaugh, was indebted to Postell, evidenced by certain notes. Renewal notes were executed, signed by Mrs. Crumbaugh, as principal, and her husband, as surety. The obligee knew that it was the debt of the husband.

In speaking of the transaction, the court said: "But this could not have deceived Postell. He knew this was not in fact a true state of case." The court held that she was only surety, and no recovery could be had against her. In this case Tompkins refused to loan the husband the money, because he ⁸²⁷ was insolvent, but was willing to loan it to his wife, which he did. After Tompkins refused to loan the money to him, he brought the note to him, purporting to have been first signed by the wife, and then by himself. The note imported that the wife was the principal, and Tompkins believed that she was, and loaned his money upon the faith that she was the principal in the note. It was said in *First Nat. Bank v. Gaines*, 87 Ky. 601, 9 S. W. 396, that "it is safe to say that, in a large majority of cases, promissory notes, on which are principals and sureties, are drawn up, 'We, or either of us, promise to pay,' " etc. This observation was made to show that the obligee should not have been misled by the language employed in the note. In the *Crumbaugh-Postell* case, the court made the case turn upon the fact that Postell knew the character of the obligation which the wife signed, it being for the debt of the husband. The court knows, and Tompkins presumably knew, that the usual way of signing obligations by principal and surety is for the principal to sign his name first on the note. To present a note as signed in this case to anyone, he would at once conclude that the person whose name appeared to have been first signed to it was principal. Mrs. Triplett made her husband her agent to deliver the note to Tompkins and received the money. She was bound by the representations which he made as her agent. The testimony of Tompkins is uncontradicted that he gave the credit to the wife, and the note was delivered to him with the representation that she was the principal in the note. A married woman empowered to contract as a feme sole was authorized to employ her husband as her agent: *Dunn v. Shearer*, 14 Bush, 574. A married woman is authorized under the present law to contract as a feme sole in the matter of borrowing money, and her husband can ⁸²⁸ act as her agent in doing so. When the wife delivered the husband the note, she made him her agent to deliver it and receive the money on it. When the husband represented that she was the principal on the note, he was acting within the apparent scope of his authority, and she is bound by what he said and did: *Commonwealth v. Hawkins*, 83 Ky. 246.

The judgment is reversed for proceedings consistent with this opinion.

A Husband may Act as Agent for his wife, and if she so holds him out to the world she is estopped to deny his authority to act for her: See the monographic notes to *Trimble v. State*, 57 Am. St. Rep. 176, 177; *Morris v. Fletcher*, 77 Am. St. Rep. 100-104; *Rust-Owen Lumber Co. v. Holt*, 83 Am. St. Rep. 518.

The Statements of an Agent are evidence against his principal if made while executing an authority conferred upon him and relating to his business and within the scope of his authority: *Carney v. Hennessey*, 74 Conn. 107, 49 Atl. 910, 92 Am. St. Rep. 199, and cases cited in the cross-reference note thereto.

A Married Woman is not liable on her contract of suretyship in Indiana: *Rogers v. Shewmaker*, 27 Ind. App. 631, 87 Am. St. Rep. 274, 60 N. E. 462.

MEERS v. McDOWELL.

[110 Ky. 926, 62 S. W. 1013.]

PARENT'S LIABILITY for Child's Negligent Use of Gun.—

If a father permits his minor son to use a loaded rifle when he knows, or should know, that, from age or mental weakness, or the use of intoxicants, the boy is incompetent to be intrusted therewith, he is answerable to a person injured by the discharge of the gun. (p. 477.)

PARENT'S RIGHT OF ACTION for Injury to Child.—For a negligent injury to his infant son, a father may maintain an action for the injury to him from the loss of the son's services, and for expenses incurred by him in consequence of the son's injury. (p. 477.)

Otis M. Mather and Charles F. Creal, for the appellants.

927 HOBSON, J. Appellant filed this suit in the Larue circuit court. A general demurrer was sustained to the petition, and the action was dismissed. The sufficiency of the petition is the only question to be determined on the appeal. The allegations of the petition are as follows: The plaintiff, George M. Meers, is the father of Shelburn Meers, an infant sixteen years of age, residing with the plaintiff. The defendant, Alonzo McDowell, is the father of Ollie McDowell, an infant — years of age, of weak and undeveloped mind for a child of his age, and in the custody and control of his father. The defendant, notwithstanding his son Ollie was at any time incapable of making proper use of dangerous weapons, negligently permitted him to have in his possession a loaded rifle, and while in possession of the rifle he shot Shelburn Meers, plaintiff's infant son, inflicting upon him injuries which permanently deprived plaintiff of his son's services, of the value of fifteen hundred dollars,

and caused expenditures by plaintiff, for nursing, medicine, and medical attention for his son, to the amount of five hundred dollars. Defendant's son Ollie was known by him to be wholly incompetent to make proper use of a deadly weapon, and was negligently permitted by him to have and use the rifle; and, while he was in possession of the rifle, defendant recklessly gave to his said son Ollie intoxicating liquor, and the son was under the influence of the liquor at the time of the shooting, which was the result of the defendant's negligence, as stated.

In *Dixon v. Bell*, 1 Stark. 287, the declaration alleged that the defendant sent a young maidservant for a loaded gun, that he knew her to be too young and indiscreet to be intrusted with the care and custody of it, and that she carelessly and improperly shot the plaintiff's minor son ⁹²⁸ with the gun, severely wounding him. The girl was between thirteen and fourteen years of age. The defendant sent word by her to the person having the gun to take the priming out. This was done. She took the gun and presented it in play at the plaintiff's son, saying she would shoot him, and drew the trigger. The gun went off. Lord Ellenborough submitted to the jury the question whether the defendant was guilty of negligence in intrusting the gun to a servant of such an age, who, under all the circumstances, was likely to make such a use of it as a person of proper discretion would not have done, and instructed them that, if the gun ought not to have been intrusted to such a person, they should find for the plaintiff. The jury returned a verdict against the defendant, which was sustained by the court. In *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, the defendant sold gunpowder to a minor of the age of eight years, whom he knew to be unfit to be intrusted with it. The child was injured by an explosion of the powder. The defendant was held liable. The court said: "By the well-settled rule of the common law, a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself in fault. The liability does not rest on privity of contract between the parties to the action, but on the duty of every man so to use his own property as not to injure the person or property of others." In *Binford v. Johnson*, 82 Ind. 426, 42 Am. Rep. 508, the defendant sold cartridges for use in a toy pistol to two boys, one aged ten and the other

twelve years, and instructed them how to use ⁹²⁹ the cartridges. Another boy six years old subsequently picked up the toy pistol containing one of the cartridges, and shot with it one of the boys who bought them. The dealer was held liable for the shooting of the child. The court quoted with approval from an English case: "The law of England in its care for human life requires consummate caution in the person who deals with dangerous weapons." It approved this as also the law in America, and said: "A man who places in the hands of a child an article of a dangerous character, and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong. If a dealer should sell to a child dynamite, or other explosives of a similar character, nobody would doubt that he had committed a wrong for which he should answer in case injury resulted. So, if a druggist should sell to a child a deadly drug likely to cause harm to the child or injury to others, he would certainly be liable to an action." These cases are approved by the text-writers: See Cooley on Torts, 594; Bishop's Noncontract Law, sec. 151; 3 Lawson on Rights, Remedies and Practice, sec. 1145. They rest upon the principle that in the use of firearms, which are necessarily dangerous, all persons are bound to take care to avoid injury to others in proportion to the probability of such injury. If the defendant's child was, from age or mental weakness or the use of intoxicants, incompetent to be intrusted with a deadly weapon, and the defendant knew the danger, or should have known it in the exercise of reasonable care, he should not have permitted him to use the loaded rifle: See note to Chaddock v. Plummer (Mich.), 14 L. R. A. 675.

It will be observed that the action is by the father for the injury to him for the loss of the son's services, and ⁹³⁰ the expenses incurred by him in consequence of the son's injury. In several cases this court has sustained actions of this character: Louisville etc. R. R. Co. v. Willis, 83 Ky. 57, 4 Am. St. Rep. 124; Railway Co. v. Carroll, 31 S. W. 132, 17 Ky. Law Rep. 274.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

A Parent may be Answerable for the negligent use of a gun by his infant son, but in general there is no liability on the part of a parent for the torts of his minor child: See Johnson v. Glidden, 11 S. Dak. 237, 76 N. W. 933, 74 Am. St. Rep. 795, and monographic note thereto. An infant is himself answerable for a reckless use of firearms: Horton v. Wylie, 115 Wis. 505, 95 Am. St. Rep. 953, 92 N. W. 245.

For an Injury to His Infant Child, a father may maintain an action for loss of services and expenses, but the right of action for the personal injury still remains in the child: *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483. It is held, however, that a father has no right of action if the injuries do not destroy or impair the ability of the child to render services to him: *Hurst v. Goodwin*, 114 Ga. 585, 88 Am. St. Rep. 43, 40 S. E. 764.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

TICE v. FLEMING.

[173 Mo. 49, 72 S. W. 689.]

EJECTMENT—Paying for Improvements.—A Statutory Provision that the plaintiff in ejectment shall pay for improvements made by the defendant in good faith does not invade the constitution in making the owner pay for improvements to which he has not consented. While he does not expressly consent thereto, he is presumed to know of his ownership and what is being done on the premises. (p. 482.)

LIMITATIONS.—The Legislature may Shorten the Statutory Period in which actions are to be prosecuted, yet, as to the shortened period fixed, a statute can be operative only after the passage of the act. (p. 483.)

EJECTMENT—Improvements—Setoff of Rents and Profits.—A judgment in ejectment for rents and profits can be reduced or even satisfied out of the award to the defendant for the value of improvements. (p. 485.)

EJECTMENT—Rents and Profits—Setoff of Improvements.—If a plaintiff in ejectment, after recovering a judgment for the land and the value of rents and profits, practically abandons it, he must, in subsequently enforcing the money part of his judgment, consent to a setoff of the defendant's award for improvements. (p. 485.)

W. E. Barton, for the appellant.

Orchard & Saye, for the respondent.

50 FOX, J. On October 7, 1899, plaintiff filed, in substance, the following petition:

"Plaintiff states that on the twenty-second day of May, A. D. 1889, in the circuit court of Missouri, within and for Texas county, and at the May, 1889, term thereof, said **51** court being one of general jurisdiction in a certain ejectment suit then there-

in pending, where this plaintiff was plaintiff and this defendant was defendant, this plaintiff recovered judgment, which was duly given by said court, against this defendant for the possession of the southeast quarter of section 25, township 28, range 9 west, said real estate being situate in Texas county, Missouri, also for the sum of \$85.92 for damages and rents, also for \$3 per month from the rendition of said judgment until the possession of said lands hereinbefore described should be restored to this plaintiff, also for his costs amounting to \$26.40 and also for a writ of restitution to be issued on said judgment. Plaintiff further says that no part of said judgment has ever been paid or satisfied, that the possession of said premises has never been restored to this plaintiff. Plaintiff further states that after the rendition of said judgment, to wit, on the twenty-second day of May, 1899, defendant instituted in the circuit court of Missouri, within and for Texas county, said court being one of general jurisdiction, a suit against this plaintiff for improvements made in good faith on the lands aforesaid and then and thereupon obtained a temporary injunction from the said court by which the judgment hereinbefore mentioned for the possession of said real estate and damages was stayed and its execution enjoined; that the said temporary injunction remained in full force for the space of six months, to wit, until November 22, 1899, at which time the same was dissolved."

The prayer is for \$650.62 and possession of land described in the petition. The answer filed November 23, 1899, properly admits the judgment sued on, admits the injunction of May, 1889, denies other allegations, and proceeds as follows:

"Defendant further answering states that he obtained an injunction against this plaintiff at the May ⁵² term, 1889, staying the judgment of plaintiff for the possession of the lands described in plaintiff's petition and the judgment for damages, \$85.92, and rents and profits, and enjoining execution thereon until such time as suit for improvements on said lands made by defendant in good faith were determined, and until whatever judgment this defendant might recover against this plaintiff should be fully paid off and discharged; and that said injunction and restraining order has never been dissolved, but stands in full force and effect. Defendant further states that at the November term, 1889, of the circuit court of Texas county, Missouri, the suit for improvements on the land described in plaintiff's petition, where this defendant was plaintiff and this plaintiff was defendant, was duly tried, and that this defendant re-

covered judgment against this plaintiff for the sum of \$350 for the value of his improvements made on said lands, together with his costs in said suit, amounting to \$71, and that he retain possession of said lands until said judgment was fully paid off and discharged. Defendant says that no part of said judgment has ever been paid, but that the whole amount thereof, with interest thereon, remains due and unpaid except \$20 on the costs of said suit, which would leave a balance due on said judgment and costs of \$401 with interest thereon at six per cent per annum from the rendition thereof. Defendant says that the judgment of plaintiff for damages would be a setoff against the judgment of this defendant to the amount of \$85.92, and rents and profits at \$3 per month for six months, amounting to \$18, making a total of \$103.92, and would be entitled to be credited on defendant's said judgment, leaving a balance due this defendant on his judgment for improvements of \$246.08. Wherefore, defendant asks that so much of his judgment for improvements on said land as will satisfy plaintiff's judgment for damages, rents and profits be set off against plaintiff's said judgment for damages, rents and profits. Defendant, for ⁵³ further answer, says that the rental value of said lands was caused by the improvements placed thereon by this defendant and defendant says he is not chargeable with rents and profits thereon."

The ten and five year limitation statutes are properly pleaded. The replication is a general denial. It will be observed from the petition in this cause that the plaintiff, in addition to the collection of the money judgment, included in his action the recovery of the land, for which he had recovered judgment by the judgment upon which this suit is brought. However, we will say that, from the brief filed by appellant, this part of the claim, as alleged in the petition, is abandoned, hence we will not regard that as being before this court for review. Appellant remarks in his brief "that the only question in this appeal is, Can this \$85.92 with interest be collected?"

In the answer in this case there is pleaded the statute of limitation, and also a judgment for improvements, which is claimed as a setoff against the judgment sued on for \$85.92. This judgment, upon which suit is brought for its collection, was rendered for damages, rents and profits in the original ejectment suit, between these parties. There is no dispute as to the facts; the judgment for improvements in favor of defendant was introduced; in fact, it is practically admitted that said judgment was recovered as alleged.

It appears from the record in this cause that appellant, in his motion in arrest of judgment, presented a constitutional question; hence this cause is transferred to this court by the St. Louis court of appeals.

There are but two questions involved in this controversy: 1. Was the action upon the judgment as alleged in the petition barred by the statute of limitation?

⁵⁴ 2. Could the judgment for improvements, recovered by respondent in November, 1889, to the extent of the judgment for rents and profits, sued on, be applied as a setoff against such action?

These questions are very fully and ably presented in the brief of learned counsel for appellant, in the brief filed in the St. Louis court of appeals. As to the constitutional question, it is not discussed; however, our attention is directed to it. It is not specifically pointed out in the brief in what particular the judgment is violative of the provisions of section 20, article 2, of the constitution of this state; hence, we will assume that it is upon the ground that the trial court was dealing partly with a judgment under the statute for improvements, and the claim of appellant is that it invades the constitution, because the person having the legal title is made to pay for improvements without in any way consenting to the improvements being made. Numerous cases have been before this court involving the questions of judgment for improvements, and these judgments have invariably been treated as valid and the statutes upon which they were based regarded as wise provisions, protecting the interests of occupants of land believing they had title, and so believing in good faith, made valuable improvements. While it may be said that the holder of the legal title does not expressly consent to the making of the improvements, he is presumed to know of his ownership of the property and is supposed to know what is being done upon the premises. If he fails to give proper notice of this claim to the property to the person who is occupying it, in good faith, believing he has the title, then upon principles of equity and justice, if he permits such occupant to remain in possession, ignorant of any superior claim, and make valuable improvements, he should compensate the occupant for such improvements, the benefits of which he subsequently enjoys. We are of the opinion that there is no merit in this contention.

⁵⁵ Upon the first question presented to us for review, as to this action being barred by the statute of limitation, we will say that we have reached the conclusion that the contention of the

appellant is well supported and the action is not barred by the statute of limitation.

When the original judgment upon which this suit is brought was rendered, the statutory period in which all actions upon judgments of this character were barred was twenty years: Rev. Stats. 1899, sec. 6796. In 1895, the statutory bar was lessened to ten years: Rev. Stats. 1899, sec. 4297. It was under the provision of the statute of 1895 that respondent bases his plea of the statute of limitation. While it may be conceded that the legislature may shorten the statutory period in which actions are to be prosecuted, yet as to the shortened period fixed, such statute can only be operative after the passage of the act. In other words, the legislature is not authorized to make a statute of limitation retrospective in its operation, and include the period of existence of the cause of action prior to the enactment of the statute. It will be observed the cases cited (*Seibert v. Copp*, 62 Mo. 182, and *Callaway County v. Nolley*, 31 Mo. 393) announce the doctrine that where the action accrued under a former statute and subsequently the statute is changed, fixing a different period, before the action is barred, the full period must elapse as fixed by the later statute. This contention is settled by the case of *Cranor v. School Dist.*, 151 Mo. 119, 52 S. W. 232. In that case the question presented was identical with the one here presented. In that case, Burgess, J., says, in speaking of the act of 1895: "But in the act of 1895 no time is given after its passage in which suits upon judgments of courts of record theretofore rendered may be brought, and if it applies to such judgments it is as to them unconstitutional and void in that it cuts short the plaintiff's right to sue, thereby depriving him of a vested right." The subject is fully discussed in that ⁵⁶ case and the conclusion reached that the statute of 1895 can have no application to judgments rendered prior to its enactment.

This brings us to the only remaining question in dispute in this cause. The contention is sharply presented in the refusal of the court to give the declaration of law, requested by the plaintiff, which substantially declared that no part of the judgment for improvements could be set off against the original judgment for rents and profits.

The action of the trial court finds support upon this disputed question, not only in the adjudicated cases, but upon the broad and growing principles of equity. The first case that makes reference to this proposition is the case of *Tissier v. Hill*, 13 Mo.

App. 36. There it is announced in unmistakable language that "the harsh rule of the common law has become so far relaxed as to allow defendant in ejectment to set off the value of improvements made by him in good faith during his occupancy, to the extent of the rents and profits claimed." In the case of *Fenwick v. Gill*, 38 Mo. 510, the court very clearly announced the doctrine that "the statute contemplates that the party dispossessed may recover compensation for all improvements made by him in good faith on the lands prior to his having notice of the adverse title," and in that case set off the value of the improvements against the rents and profits. This case was decided under the statute of 1855, section 20, page 694, which is substantially the same as the present statute in respect to that subject. It may be said, as to that case, that the defendant was in possession and claiming title through the plaintiff; but it in nowise alters the rule that one may be set off against the other. The only distinction is as to when and how the value of improvements can be recovered. In case the defendant's possession and occupancy is by claim of title through the plaintiff, then the value of the improvements may be considered in the ejectment suit; but if ⁵⁷ defendant's occupancy is under a stranger to the title of plaintiff, then his action for improvements must be an independent one, under the statute: *Henderson v. Langley*, 76 Mo. 226. The case of *Stump v. Hornback*, 109 Mo. 272, 18 S. W. 37, refers approvingly to the case of *Fenwick v. Gill*, 38 Mo. 510. In that case, the court says: "The proceedings to recover for improvements were designed merely to supplement and continue the ejectment suit out of which they grew, and enforce the equities of the occupant before the judgment in the original suit had been executed; otherwise in many cases the claims for compensation might be wholly fruitless. So it has been held, as in this case on the first appeal, that the judgment for damages, rents and profits in the ejectment suit should be set off by the award in the subsequent proceeding for compensation: *Fenwick v. Gill*, 38 Mo. 528." It will be observed that the court announces in that case that the judgment for damages, rents and profits may be set off against the judgment for value of improvements; then refers to the case of *Fenwick v. Gill*, 38 Mo. 510, as sustaining that position. It does sustain it in principle, for the case of *Fenwick v. Gill* holds that the value of the improvements may be set off against the value of the rents and profits. And the case of *Stump v. Hornback*, 109 Mo. 272, 18 S. W. 37, just reverses it and holds that the rents and profits may be set off against the

value of the improvements, and relies upon the Fenwick case to support the announcement of the principle. We take it that it needs no argument if you can set off rents against improvements, then it is clear you can reverse it and set off improvements against rents. But the case of Stump v. Hornback goes further and announces clearly the inference to be drawn from the statute; there the court says: "There is nothing in any section of the statute from which an inference can be drawn that the judgment, in the ejectment suit, is in any manner modified or affected by the proceeding for compensation other than that part of it awarding ⁵⁸ damages and accruing rents and profits, may be reduced or satisfied by the award for the value of the improvements."

It will be observed that the court in that case reached the conclusion that a judgment for rents and profits, similar to the one sued on in the case at bar, could be reduced or even satisfied out of the award for the value of the improvements, and we have reached the same conclusion.

The plaintiff in this case procured his judgment for the recovery of the land and the value of his rents and profits, and upon the defendant securing his award for the value of his improvements, the plaintiff practically abandons his judgment, makes no effort to adjust the equities and set off the rents and profits against the value of the improvements, and enforce his judgment, but after a silence for ten years, he undertakes to enforce the money part of his judgment, and insists that the judgment for improvements to the extent of his judgment for damages, rents and profits should not be set off against his action.

We cannot maintain this contention. The court, upon every principle of equity and justice, did right in allowing the defendant his setoff, and its judgment will be affirmed.

All concur.

The Statutory Period of Limitation may be shortened, provided a reasonable time for the bringing of actions is allowed: *Lawrence v. Louisville*, 96 Ky. 595, 49 Am. St. Rep. 309, 29 S. W. 450; *Relyea v. Tomahawk Paper etc. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412. Such reasonable time is the "balance of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute": *Culbreth v. Downing*, 121 N. C. 205, 61 Am. St. Rep. 661, 28 S. E. 294. As to the retrospective effect of statutes changing the period of limitation, see *Walker v. Burgess*, 44 W. Va. 399, 67 Am. St. Rep. 775, 30 S. E. 99; *Osborne v. Lindstrom*, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72.

In Ejectment a setoff for improvements may be allowed, and in some states the statutes so provide: See the monographic note to *Cleland v. Clark*, 81 Am. St. Rep. 176-178; *Petit v. Flint etc. R. R. Co.*, 119 Mich. 492, 75 Am. St. Rep. 417, 78 N. W. 554; *Estate of Gleeson*, 192 Pa. St. 279, 73 Am. St. Rep. 808, 43 Atl. 1032; *Jones v. Merrill*, 113 Mich. 433, 67 Am. St. Rep. 475, 71 N. W. 838. As to the right to set off improvements against rents and profits, see the note to *Cleland v. Clark*, 81 Am. St. Rep. 177; *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761.

JOHNSON v. JOHNSON.

[173 Mo. 91, 73 S. W. 202.]

GIFT TO WIFE as Her Separate Estate.—A gift of money by a husband to his wife, as between them or their privies in blood or estate, is her separate estate, when no rights of creditors are involved. (p. 492.)

JOINT TENANCY in Personal Property.—At the common law joint tenancies, with the incident of survivorship, obtains as to both real and personal property. (p. 499.)

ESTATES BY THE ENTIRETY may be Created in Personal as well as in real property, in Missouri, and between husband and wife as well as between strangers. (p. 500.)

JOINT TENANCY.—As to Real Property, in Missouri, a grant or devise to two or more persons will be held to be a tenancy in common, unless by the terms of the grant or devise it is expressly declared to be a joint tenancy, except as to grants and devises to executors, trustees, or husband and wife. (p. 500.)

ESTATE BY ENTIRETY not Created When Wife Furnishes Part of Purchase Money.—An estate by the entirety does not arise, nor does the right of survivorship exist, where land is purchased by a man without his wife's express written consent, partly with his and partly with her money, but she will be decreed a resulting trust in the land in the proportion that her money bears to the total purchase price. And the same rule obtains where her separate money is so invested in personal property. (p. 504.)

ESTATE BY ENTIRETIES not Created When Husband and Wife Loan Money and Take Deed of Trust.—An estate by the entirety is not created when a husband and wife each advance part of a loan and take a note secured by a deed of trust, but each is entitled to his or her proportionate share in the note and deed; and if he buys in the property at the trustee's sale, and his bid is credited on the note, her heirs are entitled to the same interest in the land that they had in the note and mortgage. (pp. 504, 505.)

WITNESSES—Death of One Party to Transaction.—When a cause of action is based on a note and deed of trust executed to a husband and wife, he cannot, after her death, testify in his own behalf. (p. 505.)

WITNESSES—Waiver of Objection to.—The right to object to the testimony of a witness, because the other party to the trans-

action is dead, is not waived, where the opposition only cross-examine him as to matters covered by his examination in chief. (p. 505.)

PARTIES in Action to Enforce Resulting Trust.—If a husband and wife each advance part of a loan, taking a note secured by a deed of trust, and he buys at the trustee's sale, having the amount of his bid credited on the note, her heirs, and not her administrator, are the proper parties to bring an action to have their interests in the land established. (p. 506.)

Alexander J. B. Garesche, Jones, Jones & Hocker and A. H. Roudebush, for the appellant.

Daniel Dillon John Dillon, and Henry S. Caufield, for the respondents.

97 MARSHALL, J. This is a bill in equity, the purpose of which is to establish a resulting trust in favor of the plaintiffs, in lots 13 to 16 inclusive, in city block 968, in the city of St. Louis, having an aggregate front, on the south line of Stoddard street, of one hundred and ten feet. The circuit court dismissed the bill and the plaintiffs appealed.

The undisputed facts in the case are as follows: The plaintiffs are the children (and their husbands) of the defendant, Daniel Johnston, and his former wife, Mary Ann Johnston, nee Fury. The defendants are the said Daniel Johnston, and his third wife, Mary Ann Theresa Johnston, nee Gheraty, and the Lincoln Trust Company. The defendant Daniel Johnston's first wife was a sister of his second wife, the plaintiff's mother. The latter was a widow when Johnston married her, in 1873. She died in 1885, intestate, leaving the plaintiffs as her only heirs. No administration was ever had upon her estate and none was necessary, as it appears that she owed no debts.

98 Prior to and on December 12, 1881, Ann Fury, the mother of Daniel Johnston's second wife, Mary Ann, and the plaintiff's grandmother, owned the land in question as her separate property. Prior thereto, to wit, between July 27, 1877 and on that date, Daniel Johnston loaned his mother in law, Ann Fury, or her husband, Michael Fury, \$2,206.08. His wife, Mary Ann Johnston had also turned over to her father or mother \$1,800. Michael Fury then died and Ann Fury was on December 12, 1881, a widow. On that day Daniel Johnston presented to his mother in law, Ann Fury, an itemized statement of the amount he had loaned or advanced to Michael Fury and Ann Fury, and what he claimed was due him as rent, amounting to \$2,206.08. To this statement was appended at the end thereof the following:

"Add money advanced to Ann Fury by Mary Ann Johnston, \$1,800.

"Total amount due by Ann Fury to Daniel Johnston and Mary Ann Johnston as per above statement on January 1, 1882, \$4,006.08.

"For which amount said Ann Fury has give her note dated January 1, 1882, secured by deed of trust of date December 12, 1881."

This was signed and sealed by Daniel Johnston and Mary Ann Johnston. The note was payable to Daniel Johnston and Mary Ann Johnston, and the deed of trust securing the note described them as beneficiaries. The note was payable at two years, and there was also semi-annual interest notes.

At the time this settlement was had and this note and deed of trust were executed, there was a prior mortgage on the land for \$5,000. Thus the matter stood when Mary Ann Johnston died in 1885. Daniel Johnston married his present wife in October, 1886. In August, 1893, the trustee under the deed of ⁹⁹ trust of December 12, 1881, being alleged to have removed from the state, Daniel Johnston procured the sheriff at St. Louis to be substituted as trustee, and caused him to foreclose the deed of trust, and at the sale Elizabeth Robeson, acting for Daniel Johnston and not for herself, purchased the property, and immediately deeded it to him. The bid was for \$5,000, but Johnston paid the sheriff only \$85 cash, and had the balance of the bid credited upon the note of Ann Fury to himself and his deceased wife.

During the years 1884, 1885 and 1886 (which was partly before and partly after the death of Mary Ann Johnston) Daniel Johnston paid off the first deed of trust on the land, paying for that purpose, it is charged, \$7,350. He also paid the taxes on the land and other expenses incident thereto, and on the other hand has received the rents. On May 23, 1899, Daniel Johnston borrowed \$7,020 from the Lincoln Trust Company, and secured it by a deed of trust on the land. He tore down the house or houses that were on the land, and with the money borrowed from the trust company, and perhaps other money of his own, and as he alleges with three thousand dollars of his present wife's money, he put up new buildings on the land. This suit was begun to the February term, 1900, of the St. Louis circuit court.

The only disputed fact in the case is whether the \$1,800, aforesaid, was the money of Mrs. Mary Ann Johnston or of Daniel Johnston. He claims and testified that she never had

any money, and his witnesses testified that they never heard of any property or money belonging to her. He testified upon the trial of this case that he "fetched home money to give to her father so he could pay the mechanics as the cellar would be built, and as the joists were put on, and different payments to them, so she could have it to hand to him," and that it was his money, and that he only placed it in her custody to be handed by her to her father, "for the purpose ¹⁰⁰ of paying for a house that her father was putting up on the land in question, which belonged to his wife, Ann Fury."

On the other hand the plaintiffs introduced a transcript of the evidence thereby preserved in the case of Fredericka Schmidt et al. v. Daniel Johnston, from which it appeared that he testified that his former wife, Mary Ann Johnston, advanced \$1,800 of the \$4,006.08 covered by the note and deed of trust of Ann Fury, dated December 12, 1881; that he could not say exactly when she advanced it; that she told him the amounts she gave and he lumped it all together and added it to his itemized account; that "she saved most of the money from house-keeping and such as that"; that she had no money except what she saved. And when his attention was called to the fact that in 1877 he himself was in the market as a borrower and he was asked to reconcile that fact with his claim of having loaned his father in law \$4,000, he answered as follows: "A. There was a large portion of that she had saved previous to that, housekeeping money. Q. She would not let you use it and preferred to have you borrow the money from Mr. Schmidt or your father in law? A. She had an idea of having some money saved up for cash money herself, and when her father wanted to build she gave it to him."

This admission, together with the physical facts in the case, constitute the evidence upon which the plaintiffs rely to prove that the \$1,800 was their mother's money, and that such money had gone into the land by reason of the purchase by the defendant of the land at the trustee's sale, and the crediting of the bid upon the note, and therefore they claim a resulting trust of nine-twentieths in the land.

¹⁰¹ 1. The primary question presented by this record is whether the \$1,800 was the money of Daniel Johnston or of his wife, Mary Ann Johnston. If it was his, that is an end of this case. If it was hers, the foundation is laid for the plaintiffs' claim, and then other questions raised in the case must be passed upon.

The defendant's contention that the money was his rests upon his testimony in this case that he "fetched" the money home and placed it in his wife's custody, to be by her turned over to her father to be used by him in paying for the building of a house upon the land involved in this case, which belonged to Ann Fury. He supplements his testimony with the testimony of others to the effect that his wife never had any money or property, or at any rate that they never heard of her having any, and they were intimate with her and her family affairs. On the contrary, the plaintiffs produced the testimony of Daniel Johnston himself, given in the case of Schmidt against him, a short time after the note and deed of trust were executed, wherein he swore that this \$1,800 was his wife's money, which she had saved "from housekeeping and such as that." And when his attention was called to the fact that in 1877 he was a borrower, and he was asked how that could be if his wife had any money saved "from housekeeping and such as that," he replied that she would not let him have it, because "she had an idea of having some money saved up for cash money herself, and when her father wanted to build she gave it to him."

So that so far as the direct testimony is concerned it all rests upon what Daniel Johnston himself said about it. His first statement was made shortly after the transaction occurred, and was also made in the trial of a case wherein it was charged that the money was his and not his wife's. His last testimony was made in the trial of this case. It may be said that both statements were ¹⁰² in one sense statements in his own interest, but in another sense his first statement also contains some of the elements of a statement or admission against interest, and it is therefore *prima facie* true. But if these statements offset each other, which is the utmost the defendants could possibly claim, then the case is left with only the statements of the defendant's witnesses, above set out, to the effect that although intimate with Mrs. Johnston and her family affairs, they never knew or heard of her having any property or money, supporting the defendant's claim, while on the other hand are the physical facts in the case, which all support the plaintiff's contention.

Those physical facts are these: 1. The itemized statement of account made by the defendant Johnston himself, upon which the settlement was made with Mrs. Ann Fury, and for the payment of which the deed of trust and note were executed, which distinctly recites the fact to be that the \$1,800 was "money advanced to Ann Fury by Mary Ann Johnston." Not money

placed in Mrs. Johnston's custody by Daniel Johnston to be by her turned over to her father, as he now claims, but "money advanced to Ann Fury by Mary Ann Johnston." This statement is signed and sealed by both Daniel Johnston and Mary Ann Johnston. It was made by him when his wife and her mother, Ann Fury, were alive, and knew whose money it was, and is of much more probative force than his self-serving statement made upon the trial of this cause, after his wife and Ann Fury were dead and therefore unable to contradict him or to tell their side of the transaction. 2. The next physical fact is that the note and deed of trust were made payable to Daniel Johnston and Mary Ann Johnston, his wife. The defendant tries to parry the effect of this fact by contending that he intended to create an estate or interest by the entirety, with the correlative right of survivorship, in the longest liver, and thus to make provision for his wife if he predeceased her, and ¹⁰³ on the other hand to preserve it all for himself if he survived her. If the \$1,800 was his money, it would have been most praiseworthy for him to make such a provision for his wife, and it would have been a legal and valid arrangement: *Case v. Espenschied*, 169 Mo. 219, 92 Am. St. Rep. 633, 69 S. W. 277. But the trouble is that the major premise of his syllogism is disputed and is the very essential and vital point in this case, and no conclusion or deduction can properly or logically be drawn from such controverted premises, nor can the rule of law involved in the conclusion afford any evidence of the existence of the disputed premises. The effect of making the note and deed of trust payable to both, if the \$1,800 was the wife's money, will be discussed hereinafter, for if it was her money and not his, the construction he puts upon this physical fact necessarily fails. Without such a construction this physical fact, read in the light thrown upon it by the settlement and receipt aforesaid, tends strongly to support the plaintiff's contention that the \$1,800 was the wife's money, and also tends to indicate that, instead of each taking security for the amount each had advanced, they took the one note and deed of trust payable to the two, for the aggregate amount of their advances, and without any idea of creating a right by the entirety, with its accompanying incident of survivorship. 3. The next physical fact is that as long as his wife lived, which was for more than four years after the note and deed of trust were made, and was for about two years after the maturity thereof, he never foreclosed the deed of trust, or set up any claim of a right by

survivorship. If the deed of trust had been foreclosed during the life of his wife, there could be no possible right of survivorship. The portion of the money advanced by each would immediately have been payable to each, and the trustee would have been obliged to pay the share advanced by each to them separately. In other words, the fact that the note ¹⁰⁴ was made payable in two years is, in itself, persuasive evidence that the husband had no idea of making a provision for his wife if she survived him, and of retaining the fund, by survivorship, if he survived her. If the idea of making provision for his wife had been present in his mind at that time, he would most likely have had the note made payable to her alone, as was the fact in *Case v. Espenschied*, 169 Mo. 219, 92 Am. St. Rep. 633, 69 S. W. 277.

And when the fact that the note was made payable in two years is considered in connection with the last-mentioned consideration, it seems measurably certain that he expected that he and his wife would each get back, out of the security, the amount each had advanced while they were both alive, and that by the foreclosure of the deed of trust, both being alive, all possibility of a right of survivorship would be cut off and cease.

It is not at all significant or important whether the wife saved this money out of "housekeeping and such as that," or whether the husband gave it to her in lump. No rights of his creditors are involved here, and therefore as between them or their privies in blood or estate, the gift by him to her made it as much her separate estate under the married woman's act of 1875, as if she had received it as a gift from any stranger or had inherited it: *Bettes v. Magoon*, 85 Mo. 580; *Clark v. Clark*, 86 Mo. 123; *Thomas v. Thomas*, 107 Mo. 463, 18 S. W. 27; *Sanguinett v. Webster*, 127 Mo. 38, 29 S. W. 698.

The physical facts, the records and statements of the husband and wife and of Ann Fury made when the settlement was had and the deed of trust and note were executed, and the conduct of the defendant since then, and especially in not foreclosing the deed of trust during his wife's life, even without taking into account at all the admissions of the defendant, point surely and convincingly to the conclusion that the \$1,800 was the wife's money and not the defendant's.

¹⁰⁵ 2. The next question in this case is whether a right of survivorship exists in personal property.

The defendant Johnston contends that the weight of authority is that such a right may be created and will be enforced.

and in support of the contention he cites a great number of cases, of which *Allen v. Tate*, 58 Miss. 585, *Draper v. Jackson*, 16 Mass. 479, *Abshire v. Wilson*, 53 Ind. 64, are fair types. He also refers to *Schouler on Personal Property*, 3d ed., sec. 156, and *Freeman on Cotenancy and Partition*, 2d ed., sec. 68.

On the other hand the plaintiffs claim that while at common law estates by the entirety existed, with the incident of survivorship, still, as between husband and wife, there could be no estate by the entirety in personal property, because the wife's personal property became the property of the husband immediately upon his reducing it to possession. The plaintiffs also claim that the cases cited and relied on by the defendant Johnston are not applicable to this case, because they were all cases where one party, either the husband or the wife, had advanced the whole consideration for the security or note which was made payable to both the husband and wife, and that as in cases of the purchase of land by the two, each furnishing their own funds for their part, and the title being taken in the names of both, so as to securities or notes, where each advanced a part of the consideration and the note was taken in their joint names, a tenancy in common and not a joint tenancy or right by the entirety, will arise, and a court of equity will protect and decree the interest of each. In support of these contentions the plaintiffs cite many cases, among them *Wilcox v. Murtha*, 41 App. Div. 408, 58 N. Y. Supp. 784; *In re Albrecht*, 136 N. Y. 91, 32 Am. St. Rep. 700, 32 N. E. 632, 18 L. R. A. 331; *Wait v. Bovee*, 35 Mich. 425. The defendant Johnston, however, calls attention to the note to the case of *In re Albrecht*, in 18 L. R. A. 329, wherein it is said: "The above case ¹⁰⁶ does not seem to have any direct precedent other than that cited in the opinion." And in the opinion the court says no reported case has been found in that state where the same question was presented, but refers to *Wait v. Bovee*, 35 Mich. 425, as authority. Therefore, the defendant Johnston questions the correctness of those cases, and claims they do not harmonize with the weight of authority.

The questions of law thus presented are not only interesting from a historical or philosophical point of view, but are most serious from a practical point of view, and a review of the law upon this subject is not only proper but necessary.

Speaking of joint tenants and the doctrine of survivorship, with respect to personal chattels as well as real estate, Chan-

cellor Kent says: "The doctrine of survivorship, or *jus accrescendi*, is the distinguishing incident of title by joint tenancy; and, therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance. The whole estate or interest held in joint tenancy, whether it was an estate in fee, or for life, or for years, or was a personal chattel, passed to the last survivor, and vested in him absolutely. It passed to him free, and exempt from all charges made by the deceased cotenant. The consequence of this doctrine is, that a joint tenant cannot devise his interest in the land; for the devise does not take effect until after the death of the deviser; and the claim of the surviving tenant arises in the same instant with that of the devisee, and is preferred. If a joint tenant makes a will, and he then becomes solely seised by survivorship, the will does not operate upon the title so acquired without the solemnity of republication. The same instantaneous transit of the estate to the survivor bars all claim of dower on behalf of the widow of the deceased joint tenant. But the ¹⁰⁷ charges made by a joint tenant, and judgments against him, will bind his assignee, and him as survivor.

"The common law favored title by joint tenancy, by reason of this very right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connection. But in *Hawes v. Hawes*, 1 Ves. Sr. 13, Lord Hardwicke observed that the reason of that policy had ceased with the abolition of tenures; and he thought that even the courts of law were no longer inclined to favor them; and at any rate, they were not favored in equity, for they were a kind of estates that made no provision for posterity. As an instance of the equity view of the subject, we find that the rule of survivorship is not applied to the case of money loaned by two or more creditors on a joint mortgage. The right of survivorship is also rejected in all cases of partnerships, for it would operate very unjustly in such cases. In this country, the title by joint tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in the case of titles held by trustees.

"In New York, as early as 1786, estates in joint tenancy were abolished, except in executors, and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. The New York Revised Statutes

have re-enacted the provision, and with the further declaration, that every estate vested in executors or trustees, as such, shall be held in joint tenancy. The doctrine of survivorship incident to joint tenancy (excepting, I presume, estates held in trust), is abolished, in the states of Connecticut, Pennsylvania, Virginia, Kentucky, Indiana, Missouri, Mississippi, Tennessee, North Carolina, and Alabama. In the states of Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New Jersey, Michigan, Illinois and Delaware, joint tenancy is placed under the same restrictions as in New York; and it cannot be ¹⁰⁸ created but by express words; and, when lawfully created, it is presumed that the common-law incidents belonging to that tenancy follow. The English law of joint tenancy does not exist at all in Ohio and Louisiana, and it exists in full force in Georgia, Mississippi and Maryland.

"The destruction of joint tenancies, to the extent which has been stated, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They cannot take by moieties, but they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him; nor is such an estate, so held by the husband and wife, affected by the statutes of partition. If an estate be conveyed expressly in joint tenancy, to a husband and wife, and to a stranger, the latter take a moiety, and the husband and wife, as one person, the other moiety. But if the husband and wife had been seised of the lands as joint tenants before their marriage, they would continue joint tenants afterward as to that land, and the consequences of joint tenancy, such as severance, partition, and the *jus accrescendi*, would apply. It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture.

"Joint tenancy may be destroyed by destroying any of its constituent unities except that of time": 4 Kent's Commentaries, 14th ed., *360 et seq.

Schouler's Personal Property, third edition, volume 1, section 156, page 191 et seq., thus treats the subject: "As there can be no 'estate' in personal property, many of those technical distinctions which are made in the books between joint estates for life, in tail, or in fee, have no application to our present

subject. But any ¹⁰⁹ interest which may be lawfully created in chattels, whether immediate or expectant, is itself susceptible of joint as well as sole ownership; and, as we take occasion to show the reader elsewhere, personal property may be limited in modern times to very much the same effect as lands, notwithstanding the natural and technical differences between them.

"Household furniture, merchandise, animals, and other movables of a corporeal character, may therefore be so vested in two or more persons as to constitute them joint owners thereof. There may likewise be joint owners of a promissory note, of a patent right, of a legacy, of stock, of an insurance policy, of a bank deposit, and, in short of any chattel whether of a corporeal or incorporeal nature, whether in the nature of a chose in possession or of a chose in action, so long indeed as that chattel can be the subject of ownership at all, unless special reason to the contrary exists. Nor does the principle apply only to chattels personal; for chattels real, such as a lease for years, may be owned by two or more jointly.

"It is the fundamental principle of a joint tenancy, that while the parties constitute but one person, so to speak, as far as the rest of the world is concerned, with regard to themselves each is entitled to an equal share of the rents, income, and profits, so long as he lives; and when one dies, the survivor takes the entire interest, to the complete exclusion of the heirs or personal representatives of the party deceased. This right of survivorship is the great clog upon property vested in joint owners as distinguished from those who own in common; for it seems very unreasonable on the face of it, that while both are equally owners, the longest liver should have the whole. And the modern policy of the law, strengthened and enforced by numerous local statutes, is to regard property which has been given or sold, granted or devised, to two or more persons without words indicating how it shall be held, as a tenancy or ¹¹⁰ ownership in common rather than a joint tenancy or ownership. And an exception which has long been made in favor of trade or agriculture is to regard the implements and stock used in any joint undertaking of this sort as exempted from the rule of survivorship, though here the modern principles to be applied are those peculiar to the law of partnership, which we shall examine hereafter.

"But it must be conceded that the policy of discouraging survivorship has been applied in practice more directly to

lands than chattels; and this we have no doubt is mainly for the reason that a strict joint ownership (not a partnership) in chattels is seldom created so as to occasion hardship or last any considerable length of time, except it be by will. The construction of wills involves chiefly the question of testamentary intent; and bequests and legacies, dependent upon the contingency of one or another's death, are by no means unusual in various other connections. The doctrine of survivorship might apply well enough, then, to gifts of this sort, if so the testator intended it, though intolerable when enforced where two persons had bought and paid for goods and chattels together, and thus jointly acquired a title by purchase. Subject to the exceptions made in favor of trade and agriculture, the rule has, it is true, been laid down, that if personal property, whether of a corporeal or incorporeal character, be given to A and B simply, without the use of other words, they will be joint owners, having equal rights as between themselves during the joint ownership, and being with respect to third persons but a single individual in the legal sense. Whether, however, this would amount to a presumption in favor of survivorship, as against a quasi partnership in the property, the decided cases leave it rather difficult to determine; and the more so from the circumstance that the term 'joint ownership' is frequently used in an indefinite sense, so far as personal property is concerned—as it certainly ¹¹¹ ought not to be—consequently embracing both the technical joint ownership and the ownership in common. The modern rule of equity is certainly to defeat a joint tenancy wherever it is possible; and in this country the incident of survivorship is destroyed by statute almost entirely, except in the case of legacies or devises, and where persons are appointed coexecutors or cotrustees or coguardian, or when one expressly creates the incident."

Dwight's Law of Persons and Personal Property, page 458, after speaking of the general rule as to joint tenancy, says: "In creating a joint interest, it is a rule of construction that a grant of a chattel to two or more makes them joint tenants, rather than tenants in common. This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel. In this case, there is a tenancy in common."

Smith on Personal Property, section 26, page 33, says: "The operation of survivorship in diverting the interest of a deceased owner from his next of kin, to whom it naturally be-

longs, is generally regarded as unreasonable and unjust, and hence is not favored by courts or legislatures. Numerous statutes have been passed providing in effect, that where property is given or sold, granted or devised, to two or more persons without words expressly or by necessary implication creating a joint tenancy or ownership, it shall be held to constitute a tenancy or ownership in common, rather than a joint tenancy or ownership. And, in the absence of legislation on the subject, courts generally incline to a construction of instruments that will establish a tenancy or ownership in common, in preference to a joint tenancy or ownership.

"But the doctrine of survivorship is well adapted to executors, administrators, trustees, and others, acting in a fiduciary capacity, who have the legal title, but ¹¹² no equitable interest in the property; and hence they are generally held and treated as joint owners."

Williams on Personal Property (fourth edition), marginal page 306, says: "Indeed, as a general rule, joint ownership is not favored in equity, on account of the right of survivorship which attaches to it. If, therefore, two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased of the share advanced by him. And where the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured."

The author cites in support of the text the case of *Petty v. Styward*, 1 Ch. Rep. 57, 21 Eng. Ch. Rep. (full reprint) 506. This is peculiarly applicable to the case at bar, for the facts are similar.

The report of this case is as follows: "That the defendant Nicholas Styward, and one Simeon Styward (whose executor the plaintiff is) lent £2,500 to Sir Thomas Glenham, £1,450 of the said money being the proper money of the said Simeon, and £550 residue was the defendant's money, and for security the said Sir Thomas Glenham mortgaged lands to the said Simeon afterward, and the defendant Styward and their heirs, redeemable at a day prefixed upon payment of £2,630; that the said Simeon before the day of redemption made his will and disposed of the said £550, and therein recited that the £1,450 was delivered by him to the said defendant his father, which appeared by a note under both their hands; and that if the said

lands should be redeemed by payment of the said £2,500 with interest, then the said £1,450, with its interest, should be delivered into the plaintiff's hands for the uses in the said will; the very day of redemption the said lands were redeemed, and the whole money and interest paid unto ¹¹³ the defendant, which the said defendant claimeth by survivorship.

"This court is clearly of opinion, that by equity in a case of this nature there ought to be no survivorship, in respect the same was but a mortgage, and the money was repaid at the day, and the note under both the said parties' hands, and the will of the said Simeon sheweth plainly a trust each in the other, and an intention that if the money was repaid, either of them should have his money again with interest, and decreed the defendant to pay to the plaintiff the £1,450 and interest so by him received."

The rule thus laid down in Williams on Personal Property, is quoted and adopted in Darlington on Personal Property, pages 305, 306: See, also, 3 Minor's Institutes, pt. 1, p. 31.

Thus it appears that at common law joint tenancies, with the incident of survivorship, obtained as to both real and personal property, but that in a majority of the states of the Union joint tenancies have been abolished by statute absolutely or the estate declared to be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy. The latter is the statute law in Missouri as to real estate (Rev. Stats. 1899, sec. 4600), except as to conveyances to executors, trustees or husband and wife. Construing this statute, this court, per Black, J., in *Rodney v. Landau*, 104 Mo. 259, 15 S. W. 964, said: "The policy of the American law is opposed to survivorship and that policy is clearly indicated in our statutes. While joint tenancies are not abolished in this state, still, to create such a tenancy, there must be an express declaration to that effect in the deed or will creating the estate."

It will be observed that under our statute executors and trustees and husband and wife are excepted from the requirement of the statute that the joint tenancy shall be expressly declared in the grant. The statute ¹¹⁴ has been in this form since 1835, except as to husband and wife, and it was amended in 1865 so as to except husband and wife: *Russell v. Russell*, 122 Mo. 237, 43 Am. St. Rep. 581, 26 S. W. 677; *Lemmons v. Reynolds*, 170 Mo. 227, 71 S. W. 135.

In *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302, it was held that the interest of a husband in land by the entirety could

be sold under execution, but that his wife, surviving him, would take the entire estate. And in *Russell v. Russell*, 122 Mo. 237, 43 Am. St. Rep. 581, 26 S. W. 677, it was held that "owing to this legal unity of husband and wife, it is said to be impossible, even by express words, to convey land to them so as to make them tenants in common with each other." But it will be observed that the effect of the married woman's acts of 1875, 1883, and 1889, were not considered in that case, probably because the conveyance then undergoing adjudication was made before the passage of those acts.

In *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342, the grant was made after the passage of the married woman's acts, and the court held that "the statute abolishes the legal unity between the husband and wife, which gave rise to estates by the entirety, but the estate itself has not been abolished." Perhaps a more accurate statement would be that since the passage of the married woman's act a husband and wife must be held to have the same right to hold a joint estate, an estate by the entirety, with the incident of survivorship, that any other persons have, but that under section 4600 of the Revised Statutes of 1899, a grant to the husband and wife need not be expressly declared to be a joint tenancy.

The sum of the matter, therefore, is that estates by the entirety may be created in Missouri, in personal as well as in real property, and between husband and wife as well as between strangers, but that as to real property a grant or devise to two or more persons will be held to be a tenancy in common, unless by the terms of the grant or devise it is expressly declared to be a joint tenancy, except as to grants or devises to executors, trustees or husband and wife, which are excepted ¹¹⁵ from the operation of the statute, and that as to personal property the common law has not been changed by statute, except by the married woman's acts which have placed a husband and wife on the same footing in this regard as any other persons. That is, the husband's common-law right to the wife's personal property and choses in action is taken away, except as to such as she had, and he had a vested right to reduce to possession, before the passage of the married woman's acts: *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788, 141 Mo. 574, 42 S. W. 1074.

3. The next question arising upon this record is whether an estate by the entirety existed in this case, as to the note and deed of trust.

The premises are that Mary Ann Johnston furnished \$1,800, and Daniel Johnston furnished \$2,206.08, and that they took the note of Ann Fury for \$4,006.08, secured by deed of trust, payable to Daniel Johnston and Mary Ann Johnston, and that both Daniel and Mary Ann signed the receipt for the note and deed of trust as a settlement of their respective claims.

In *Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137, *Seay v. Hesse*, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 1033, *McGregor-Noe Hardware Co. v. Horn*, 146 Mo. 129, 47 S. W. 957, it was held that if the husband invested the money of his wife, acquired by her after the passage of the married woman's acts and in the manner specified in those acts, without the knowledge or written consent of the wife, in real estate, and took the title in their joint names, it did not create a joint tenancy or estate by the entirety, but that a court of equity would decree the wife a resulting trust in the land in the proportion that her money so invested bore to the total purchase price. This rule was followed in the case of *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847, and the fact that after the unauthorized investment the wife learned of the fact and refused ¹¹⁶ to join in a deed of severance of their respective interests, was held immaterial. So that notwithstanding the provisions of the statute (Rev. Stats. 1899, sec. 4600), this has now become a rule of law as well as of property in this state, so far as real estate is concerned.

The state of the law as to personal property is as follows: In *Shields v. Stillman*, 48 Mo. 82, it appeared that the wife owned separate real estate. She leased the land and took the rent notes payable to herself and her husband. She died, and the husband instituted a suit in his own name under the landlord and tenant act before a justice of the peace, to recover the possession of the land, and to recover the rent in arrear evidenced by two of the rent notes aforesaid. The defendant insisted that the husband was not entitled to possession of the land at all, because, upon the death of Mrs. Shields intestate, the land immediately descended to her daughter, including the rents reserved. The husband, however, claimed that as the rent notes were made payable to him and his wife, the legal effect thereof was that they were payable to him alone, and that the rents were thus appropriated to his use by his wife's appointment. The court, however, held that the appointment was not to the husband alone, but to the husband and wife jointly, and,

hence, the plaintiff's theory was untenable; but the court adopted a theory not suggested by either party, and held that the taking of the notes payable to the husband and wife made an estate by the entirety, and that upon the death of the wife the husband was entitled to the whole by right of survivorship, and accordingly held that the husband was entitled to a judgment for the notes, although he was not entitled to a judgment for the possession of the land.

It must be observed, however, that this case arose before the passage of the married woman's acts, and that the wife furnished the whole consideration for the notes, and that the court did not put the decision upon the common-law right of the husband to reduce the ¹¹⁷ wife's choses in action to possession, but treated it as if they were mere strangers to each other.

Counsel for defendant also cite many cases from other jurisdictions which hold that where either of the married couple—or where any one of two persons—furnishes the consideration for a note or mortgage or personal property and makes the note or mortgage payable to both or takes the title to the property in the names of both, an estate by the entirety will thereby be created in law. On the other hand counsel for plaintiffs, while admitting that this is the rule of law if the whole consideration is furnished by only one of the two persons, denies that such is the law where each of the two persons furnishes a part of the consideration, and in support of this contention, counsel cite *Wilcox v. Murtha*, 41 App. Div. 408, 58 N. Y. Supp. 784, *In re Albrecht*, 136 N. Y. 91, 32 Am. St. Rep. 700, 32 N. E. 632, 18 L. R. A. 331, and *Wait v. Bovee*, 35 Mich. 425, where this distinction is made.

It will be noted that *Petty v. Styward*, 21 Eng. Ch. Rep. (full reprint), 506, lays down the same rule. Schouler on Personal Property, section 156, page 192, speaking of the right of survivorship, says: "The doctrine of survivorship might apply well enough, then, to gifts of this sort, if so the testator intended it, though intolerable when enforced where two persons had bought and paid for goods and chattels together, and thus jointly acquired a title by purchase." And the same author, page 193, says: "The modern rule of equity is certainly to defeat a joint tenancy wherever it is possible."

Dwight on the Law of Persons and Personal Property, page 458, says: "This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel."

Williams on Personal Property, fourth edition, marginal page 306, says: "Indeed, as a general rule, joint membership is not favored in equity, on account of the right ¹¹⁸ of survivorship which attaches to it. If, therefore, two or more persons advance money by way of mortgage or otherwise, and take the security to themselves jointly and one of them die, the survivor will be a trustee in equity for the representatives of the deceased, of the share advanced by him." Darlington on Personal Property, page 305, adopts the rule thus stated by Williams.

Therefore, outside of this state an exception to the general rule of the right of survivorship has grown up, in equity, where each of the two persons furnishes a part of the money with which the personal chattel is purchased, or which makes up the note or mortgage.

In Missouri, since the passage of the married woman's acts, it has been uniformly held that if a husband invests any of his wife's separate money, acquired by her after said acts took effect and in the manner therein specified, together with money of his own in real estate in their joint names, without her express written consent so to do, it will not create an estate by the entirety, but the wife will, by a court of equity, be decreed a resulting trust in the land to the extent represented by her money.

In *Winn v. Riley*, 151 Mo. 61, 74 Am. St. Rep. 517, 52 S. W. 27, it was held that if the husband takes his wife's money, arising as aforesaid, and uses it in his business, his wife could treat him as her debtor or as her trustee as she chooses.

In all of these later cases, except *Winn v. Riley*, the investment of the wife's separate money, with other money of the husband, was in real estate, while here it was in personal property. But this is an immaterial difference. For at common law there was no difference between the right of survivorship as to real property or as to personal chattels. And as hereinbefore shown, section 4600 of the Revised Statutes of 1899 excepts grants to husband and wife, and leaves the rule as to them as it was at common law, so far as real estate is concerned, and the married woman's acts have abolished the common-law ¹¹⁹ unity of the husband and wife and placed married women, as to their separate personal, as well as their real, property, on the same footing toward their husbands, as any other persons occupy toward each other.

The result is that not only in the other jurisdictions referred to, and according to the text-writers quoted from, but also by

the more recent decisions of this court, an estate by the entirety does not arise, nor does the right of survivorship exist, as to real estate where the land is purchased by the husband without the wife's express written consent, partly with the money of the husband, but the wife will be decreed a resulting trust in the land, by a court of equity in the proportion that her money bears to the total purchase price of the land.

There is no good reason why the same rule should not obtain where the wife's separate money is so invested in personal property. Under such circumstances it cannot be assumed or inferred that she intended to create a right of survivorship, for she did not act at all, but it was the unauthorized act of the husband, and as he could not directly reduce her separate property to his possession or obtain title thereto without her express written consent, so he could not indirectly do so by investing it in their joint names and thus create a right by survivorship in himself.

It will be noticed that in all the cases cited the wife was ignorant of and took no part in the investment of her separate money, with her husband's money, while in the case at bar the wife knew that the note and deed of trust representing their joint investment were made payable to her husband and herself, and consented to that arrangement, and signed the written settlement upon which the note and deed of trust were based and for the payment of which they were given. This case, therefore is in this regard unlike any of the cases heretofore decided in this state, but falls within the exception ¹²⁰ to the general rules in reference to estates by the entirety heretofore quoted from the cases decided in other jurisdictions and from the text-writers, to the effect that the right of survivorship does not obtain where each of the two persons contributes a part of the money invested, and that a court of equity will always decree to each his proportionate part of the investment. This exception, as herein pointed out and as stated by Schouler on Personal Property, rests upon the principle that it would be intolerable that the doctrine of survivorship should be applied where two persons bought and paid for goods and chattels together, and thus jointly acquired a title by purchase.

The conclusion follows that under the circumstances of this case an estate by the entirety or right by survivorship was not created, but that each was entitled to their proportionate share of the note and deed of trust. It also follows that as the husband paid only \$85 in cash, and had the balance of the bid of \$5,000

credited upon the note, the money has been thus traced into the land, and that the heirs of the wife are entitled to the same interest in the land that they had in the note and mortgage, that is, the wife is entitled to a share equal to nine-twentieths thereof and the husband to the remainder.

4. Over the objection of the plaintiffs the husband was permitted to testify in his own behalf, and this is assigned as error.

Section 4652 of the Revised Statutes of 1899 provides, "that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him."

121 The contract or cause of action in issue and on trial in this case was the note and deed of trust given by Ann Fury to Daniel Johnston and Mary Ann Johnston, and the rights of those two payees in the note and deed of trust, and in the land into which the money represented by the note and deed of trust had become merged by the act of Daniel Johnston. Mrs. Johnston was dead. Consequently, under the statute, Daniel Johnston was an incompetent witness: *Curd v. Brown*, 148 Mo. 95, 49 S. W. 990.

The plaintiffs cross-examined him only as to matters covered by his examination in chief, and therefore they have not waived their right to insist on this objection. The record does not support the claim that the plaintiffs recalled him as their witness after he had finished testifying, when called by the defendants. He was recalled to the witness-stand after an adjournment of the court, but it appears that he was still on the stand undergoing cross-examination when the adjournment was had, and what took place afterward was only a continuation of his unfinished examination.

5. Inasmuch as the plaintiffs waited from 1893 when the deed of trust was foreclosed until 1900, when this suit was begun, and permitted the title to stand in the name of Daniel Johnston, their rights must be subordinated to the rights of the Lincoln Trust Company, that loaned the \$7,020 to him upon the faith of the whole property. But as there must be an accounting in this case between the plaintiffs and Daniel Johnston, and as in that accounting all such questions must be settled, it is unnecessary to determine the rights of the plaintiffs and Johnston as to such matters of accounting at this stage of the proceedings.

6. The heirs and not the administrator are the proper parties to prosecute this action. This is a bill in equity ¹²² to declare a resulting trust in land, and not an action to recover Mrs. Johnston's interest in personal chattels or for damages for a conversion of a chose in action, and therefore the heirs and not the administrator must sue.

For these reasons the judgment of the circuit court is reversed and the cause remanded to be proceeded with in accordance herewith.

All concur.

A Tenancy by the Entireties may exist in personal as well as real property: Bramberry's Appeal, 156 Pa. St. 628, 36 Am. St. Rep. 64, 27 Atl. 405; Phelps v. Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430, and note; note to Den v. Hardenbergh, 18 Am. Dec. 382, 383. An examination of these notes, however, will show that this doctrine has not passed unchallenged.

Tenancies by the Entirety are discussed in the monographic note to Den v. Hardenbergh, 18 Am. Dec. 377-389. Such a tenancy is created when the grantees are husband and wife, unless it is manifest that a different estate is intended: Thornburg v. Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, and cases cited in the cross-reference note thereto; Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162, 41 N. E. 68, 590; Appeal of Lewis, 85 Mich. 340, 24 Am. St. Rep. 94, 48 N. W. 580. As to whether this rule has been changed by modern statutes, see Baker v. Stewart, 40 Kan. 442, 10 Am. St. Rep. 213, 19 Pac. 904; Robinson, Appellant, 88 Me. 17, 51 Am. St. Rep. 367, 33 Atl. 652; notes to Rose v. Rose, 84 Am. St. Rep. 442; Den v. Hardenburgh, 18 Am. Dec. 380.

WIDDECOMBE v. CHILES.

[173 Mo. 195, 73 S. W. 444.]

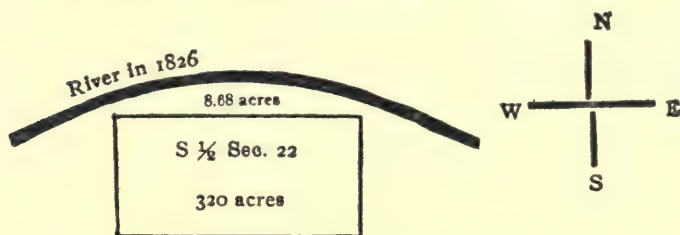
ACCRETIONS, Title to.—If the Fractional North Half of a section bordering on a river is entirely washed away, making the south half the river front, accretions, thereafter formed against the south half, although they extend over and beyond the space where the fractional north half had been when the survey was made, belong to the owner of the south half. And the case is not altered by the fact that no patent for the north half was issued until after its re-formation from the accretions to the south half. (pp. 512, 514.)

Paxton & Rose, for the appellants.

J. N. Southern, for the respondent.

197 VALLIANT, J. This is an action in ejectment for possession of the northeast quarter and the east one-half of northwest quarter of section 22, township 51, range 30, in Jackson county, containing about two hundred and thirty acres. The land in suit is the result of the land building propensity of the Missouri river, and the question is whether it was an accretion to the north half of section 22 or the south half.

198 By the United States survey in 1826, section 22 was a fractional section, consisting of the south half, which was a full half-section, and a small strip containing eight and sixty-eight hundredths acres lying along the north line of the south half and extending to the Missouri river. This strip of eight and sixty-eight hundredths acres was all there was of the north half and it lay between the south half and the river thus:



From 1826 to 1853 the river gradually changed its bed by cutting away its south bank until it had washed away all of the right and sixty-eight hundredths acres forming the fractional north half of the section and a considerable part of the south half, so that not only was the south bank of the river in the south half of the section, but the whole river flowed through

the south half and converted it into a fractional half section. About 1953 the river ceased encroaching and began gradually to rebuild where it had washed away, and this process continued until 1896, when it had not only rebuilt where it had washed away, but had added more than two hundred acres, which would have been in the north half of the section if it had existed when the government survey was made in 1826.

¹⁹⁹ In 1896 plaintiff's grantor obtained a patent from the United States for the fractional north half of this section, containing, in the words of the patent, "eight acres and sixty-eight hundredths of an acre."

The claim of the plaintiff is that the accretion was to the eight and sixty-eight hundredths acre strip, and if that is true he is entitled to recover. The defendants claim that the accretion was to the south half of the section, and if that is true the judgment should be for them. It was agreed that if plaintiff was entitled to recover his damages should be assessed at one dollar, and the rents and profits at four dollars a month.

The court gave peremptory instructions for the plaintiff, which resulted in a verdict and judgment in his favor, from which the defendants appeal.

The principles upon which the decision of this case must be founded have already been established by previous decisions in this court, although, perhaps, the identical question, at least the question in identical form now before us, has not been answered.

In *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589, the facts were that in 1817, when the government survey was made, there was an island in the river which afterward became the property of the plaintiff. The land of the defendant in that suit was shown by that survey to be on the north bank of the river, the main channel of which ran between the island and defendant's land. The river made encroachments on defendant's land, thereby pushing its north bank farther north and taking into its bed a portion of what had been defendant's land. After a while it changed its course, the main channel got around on the south side of the island and accretions began to form against the north side thereof, and in the course of time these accretions extended across what had formerly been the bed of the river and covered that space where defendant's land had been before it was washed away.

²⁰⁰ The defendant in that case insisted that, when the accretions reached the place where according to the old survey

his land had been, they became his property, being in fact his land restored.

But this court, per Gantt, P. J., said: "On the contrary, if after the original survey in 1817 a part of said fractional section 4 was washed away by the river, and the main channel of the river covered the place where it originally stood, for any considerable length of time, and afterward accretions to the island began and gradually grew and extended north toward the north bank until they went beyond what was originally the southern or river boundary of said section 4, said accretions thus formed to the island belonged to the owner of the island, and not to the owner of the original fractional section 4." In support of that doctrine the court cites the following cases: Wells v. Bailey, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565; Buse v. Russell, 86 Mo. 209; Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. Rep. 396.

The principles there laid down are, that the accretions belong to the man who owns the land against which the deposits were made, and that they do not belong to the man who owns land against which such deposits were not made, although they cover a space where his land was before the river washed it away. The only difference between that case and this is, that there the original lands of both parties were riparian and neither at any time ceased to have a visible body above water and a river front, while here the original land which the plaintiff's patent calls for had been washed away entirely, and the land of the defendant did not have a river front until the eight acre strip had been cut away by the river. Yet the principles deduced from that case are applicable here. If there had been an island in front of this eight acre strip in 1826 when the survey was made, and if after the strip had been cut away and the river had encroached far into the south half of the section, accretions had formed against the island and extended ²⁰¹ over the eight acre strip and over the washed away part of the south half, the law as declared in Naylor v. Cox would have given the title to the owner of the island, although the accretions filled the space that had once been filled by the eight acre strip and the washed away part of the south half of the section.

The land in dispute in Naylor v. Cox became the subject of another suit between the same parties, and reached this court under the style of Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592. In the latter case the evidence seemed to show that the made land in dispute was the result of

a towhead which had risen out of what had been the bed of the river, and that accretions were made to the towhead until it reached the main land. The plaintiff in that case, who was the defendant in the Naylor suit and was the owner of the mainland, contended that as the new land had come up out of the bed of the river in the space where his land had been before it was washed away, it belonged to him and not to the owner of the island. But the court held that, as he was the plaintiff in the case, it was not sufficient for him to show that the land was not an accretion to the island, or that it was an accretion to the towhead where his land had once been, but that before he could make his title good he must show that it was an accretion to his mainland, and that the fact that the towhead came up out of the bed of the river at a point where his land was before it was washed away did not constitute it his land restored.

The facts in the case at bar do not make it necessary for us to decide to whom the accretion would have belonged if it had grown from a towhead that had come up out of the bed of the river in the place where the eight acre strip had once been, for there is no evidence tending to show such a condition.

This court in every case that has come before it involving the subject of accretions to riparian lands has held that, in order to show title to the accretions, one must show that they were formed by deposits against ²⁰² visible land which he or his grantors owned: *Buse v. Russell*, 86 Mo. 209; *Hahn v. Dawson*, 134 Mo. 581, 36 S. W. 233; *Price v. Hallett*, 138 Mo. 561, 38 S. W. 451.

The question in the very form we now have it has been decided by the supreme court of Connecticut in a case referred to in *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589. The Connecticut court said: "They say, in the first place, that the law of accretion applies only to the case of riparian land, and that as the plaintiff's lot did not originally bound upon the river, but was conveyed to him by distinct lines and boundaries, at least upon the sides affected by the present question, it cannot become, by any changes of the river, riparian land. We cannot accede to this claim. If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All

original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation and is not affected in any manner by the relations of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that had been taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter but now proximate lot. Having become riparian, it has all riparian rights. This general principle is recognized by all text-writers and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary and the rights of the parties as changing with the change of its bed.

203 "The defendants claim, in the next place, that though a riparian owner may take by accretion to the middle of the stream, or in case of a navigable river to high-water mark, yet that that being the limit of his original title, and in the case of a non-navigable river the line of the adjoining owner, he cannot take such accretion beyond that line. This claim is utterly without support": *Wells v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565.

That case is referred to with approval in *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617, and *Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641, in both of which, also, our cases of *Naylor v. Cox*, and *Cox v. Arnold*, are quoted with approval.

We are cited by respondent to *Crandall v. Allen*, 118 Mo. 403, 24 S. W. 172, as holding contrary to the doctrine above mentioned, but we do not so understand that case. There the plaintiff's land was bordered by the river. It lay north of the land of defendant and between it and the river. But in the course of time so much of the plaintiff's land washed away as that it brought the river to defendant's land and gave him a river front, but it did not wash away all of the plaintiff's land. Then, when the river changed it began building land against the defendant's front and continued the process until the new made land came in front of plaintiff's land and there were accretions to the plaintiff's land also. The contention of the defendant was that he was entitled not only to the accretions to his own front, which were conceded to him, but also to that in front of the plaintiff, because the land building had its be-

ginning on his land, but it was held that he was entitled only to that formed on his own front. The court said: "We find nothing in the record that questions that this accretion in front of plaintiff's land formed to his shore." The court by no means qualifies what it said in *Naylor v. Cox*, but reaffirms it. *Crandall v. Allen* is itself authority for the proposition that land, though it did not reach the river when it was originally surveyed, or when the party bought it, yet became riparian land when the intervening ²⁰⁴ land is cut away by the river, and that the owner has title to accretions formed against it.

In support of the contention that the south half of section 22 could not be considered riparian land because its description on the survey does not call for the river as its boundary, we are referred to *Smith v. St. Louis Public Schools*, 30 Mo. 290; *Benson v. Morrow*, 61 Mo. 345; *Buse v. Russell*, 86 Mo. 209; *Ellinger v. Missouri Pac. Ry. Co.*, 112 Mo. 525, 20 S. W. 800; *Sweringen v. St. Louis*, 151 Mo. 348, 52 S. W. 346. But in none of those cases had the river cut away the intervening land and given the land in question a river boundary in fact. Those decisions go no further than to hold that if the call in the deed is for a boundary short of the river, for example to a street or to a wharf line, the grant is not to the river and the land granted is not riparian.

This court has not said in either of those cases, and we doubt if any court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river, which in fact did not reach the river when the deed was made, does not become riparian when the intervening land is washed away and the river in fact becomes a boundary.

It is said, as in support of the plaintiff's claim, that the United States never parted with the title to the fractional north half of section 22 until 1896 when the patent under which plaintiff claims issued. But that fact does not alter the law of the case. If the government parted with the title to the south half, but held title to the fractional north half until the latter was entirely washed away and accretions formed against the south half, they became the property of the owner of the south half. The owner of the south half holds his title as much from the government as does the owner of the north half; a patent to the south half would carry to the grantee not only title to the then present land, but also all the incidents of ownership, of which is the ownership of accretions. The learned counsel for respondent ²⁰⁵ in their brief say: "In the

absence of express legislation by Congress, the rules of the common law applied to its (the government's) ownership of this land, and as plaintiff's grantor obtained the patent for it in 1896 this action should be reviewed as if the government itself, at the time of the grant, had found the defendants on the survey of this land, and brought an action to evict them." That is true; the common law does apply to the title held by the government (except in certain particulars, as, for example, that it is not affected by prescription or the statute of limitations) in the same manner that it applies to the title held by an individual, and it is by virtue of the rules of the common law, as declared by the courts of this country, that the accretions in question in this suit, if they formed against the south half, after the fractional north half had entirely disappeared in the bed of the river, belonged to the owner of the south half. When this fractional north half was surveyed and offered for sale by the government, it was visible land, capable of being held in possession; it was not in the bed of the river. The government never undertook to sell land the metes and bounds of which were at the bottom of the river, and if it should sell land bounded by a river, that boundary is subject to shifting the same as if an individual was the seller. The supreme court of the United States, speaking of land belonging to the government has said: "Where a water-line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed line": *Jeffries v. East Omaha Land Co.*, 134 U. S. 178, 196, 10 Sup. Ct. Rep. 518.

And as bearing on this point we quote again from that court: "The United States have not repealed the common law as to the interpretation of its own grants, nor explained what interpretation should be given to or imposed upon the terms of the ordinary conveyances ²⁰⁶ which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the lands may lie. In our judgment, the grants of the government for land bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie": *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808.

The learned counsel for appellant in their brief illustrate the proposition under consideration by such an apt hypothetical case that we quote it:

"Suppose A owns a tract of land which does not touch the river, but in front of it are lots 1 and 2 which belong to the United States. B buys lot 1 and then the river entirely cuts away both lot 1 belonging to B and lot 2 belonging to the government, encroaching on A. Then accretions form on A's land and extend over the places formerly occupied by lots 1 and 2. C now gets a patent to lot 2. Is C, who bought a spectral title, any better off than B who bought a real title?"

This case ought to have been submitted to the jury on the theory that if the fractional north half of section 22 was entirely washed away, making the south half the river front, then if the accretions formed against the south half, they became the property of the owner of the south half, even though they extended over and beyond the space where the fractional north half had been when the survey was made.

The judgment is reversed and the cause remanded to be retried according to the law as herein declared.

All concur.

Accretions and Alluvion are considered in the monographic notes to Hagan v. Campbell, 33 Am. Dec. 276-281; Coulthard v. Stevens, 35 Am. St. Rep. 307-313. Consult, also, the subsequent cases of Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; Noyes v. Collins, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250; Sage v. Mayor, 154 N. Y. 61, 61 Am. St. Rep. 592, 47 N. E. 1096; Bellefontaine Impr. Co. v. Niedringhaus, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; Hammond v. Shepard, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867; Freeland v. Pennsylvania R. R. Co., 197 Pa. St. 529, 80 Am. St. Rep. 850, 47 Atl. 745. According to Welles v. Bailey, 55 Conn. 292, 3 Am. St. Rep. 48, 10 Atl. 565, the principle that a riparian owner takes all accretions from the gradual change of a riverbed applies where land, though not originally riparian, becomes so when the river reaches it by gradually washing away all the intervening land. The remoter land then becomes riparian as much as if it had been originally such, and all the incidents of riparian land attach thereto.

STATE v. ARMOUR PACKING COMPANY.

[173 Mo. 356, 73 S. W. 645.]

MONOPOLIES AND TRUSTS—Agent's Statements as Evidence of.—Statements made by solicitors taking orders from retail butchers, and by managers of "coolers" where dressed meat is kept, are admissible in evidence to show that their principals are members of a combination to fix the price of meat. (pp. 525, 526.)

MONOPOLIES AND TRUSTS—What Evidence Establishes.—Evidence that corporations engaged in the same place in the same line of business bill goods at the same price, allow rebates, give notice of an advance of rates at a certain date, always followed by a rise, call in competitors to obtain a concession to sell old goods at a reduced rate, gather up papers of competitors showing that they have been selling below a certain price, and discontinue all this when the legality thereof is called in question by the state—is sufficient to establish an unlawful combination to fix prices. (pp. 526, 528.)

MONOPOLIES AND TRUSTS.—It is no Defense to a combination to fix prices among corporations furnishing dressed meat to retail butchers, that it has benefited the commonwealth by encouraging stock-raising, giving employment to many people, and putting in circulation vast amounts of money; or that its suppression will injure the stock-raising industry; or that the home companies will suffer if their franchises are taken away; or that the retailers are worse in their practices than the combine; or that the trust, in one city, was never effective because not lived up to by some of its members. (pp. 528, 533.)

MONOPOLIES AND TRUSTS—Validity of.—Combinations to fix and maintain the price of necessities are void at the common law, and statutes prohibiting them are constitutional. (p. 530.)

MONOPOLIES AND TRUSTS—Punishment.—The character of the punishment to be imposed, where corporations combine to fix prices, rests in the discretion of the court. A judgment of absolute ouster is not imperative, but justice may be satisfied by the payment of a fine and costs. (p. 534.)

Edward C. Crow, attorney general, for the informant.

Karnes, New & Krauthoff and Frank Hagerman, for the respondents.

368 MARSHALL, J. This is a proceeding by quo warranto, instituted by the attorney general ex-officio, to oust the defendant corporations from their franchise to do business in this state, because of alleged violations by them of their powers and privileges.

The information charges that between August 22, 1899, and May 9, 1902, they "entered into an agreement, confederation, combination, pool and understanding among themselves, and

with each other and Nelson Morris & Co., and Schwartzchild & Sulzberger, and other corporations and persons, to regulate, fix, and control the price to be paid by retail butchers and others for all dressed pork, beef and cured meats and ³⁶⁹ lard, slaughtered, manufactured and prepared and offered for sale or to be sold in the state of Missouri; and to maintain and control said prices for said products in this state when so regulated and fixed; and to prevent competition in said business in preparing, marketing and selling said products in this state between themselves and others engaged in like business; and that respondents and those others above named have maintained the said prices of dressed beef and pork and fresh meat, cured meat and lard so prepared, sold and offered for sale by them in this state, by and through their officers, managers, agents, salesmen, servants and employés acting for and in behalf of said corporations, and that by the acts and conduct of said corporations through their officers, salesmen, managers, agents, servants, and employés competition in the sale of dressed beef, dressed pork, fresh beef and cured meats of all kinds and lard in the markets of Missouri, has been unlawfully prevented and destroyed, to the great detriment of the public."

The information charges that "respondents and those who have combined with them, own, control and supply to the general public, ninety per cent of the dressed pork, beef and meats and all smoked and cured pork, beef and meats and lard, and all fresh beef and pork and meats slaughtered, manufactured and cured and prepared, and offered for sale or sold for general consumption in the state of Missouri, and that the object and purpose of said combination and agreement is to fix, regulate and maintain the price to be paid by the consuming public for said products above mentioned, and to control said price when so fixed, maintained and regulated and to destroy competition among themselves and others engaged in like business"; it is charged that "the officers, managers, agents, servants, and employés of the respondents, legally and fully authorized by each of the said several respondents to ³⁷⁰ act for them and in their behalf in matters relating to the sale and price to be charged for the products above mentioned have since the twenty-first day of August, 1899, met and continuously from time to time since said day continued to meet, when they have deemed it necessary, and unlawfully agreed and combined to fix and maintain from week to week and day to day an agreed price on the different grades, classes and kinds of dressed beef,

fresh beef, dressed pork, hams, bacon, cured meats and lard, which should be sold or offered for sale to the retail butchers and others and the consuming public in Missouri; that at said meetings the officers, managers, employés and agents of respondents would and did agree upon and fix the price which the respondent corporations through their officers, agents and employés would sell in Missouri from week to week and day to day, the products above mentioned to the consuming public; that said meetings were held by the said officers, agents and representatives of the respondents for the purpose of fixing and maintaining the agreed price to be charged in St. Louis, Kansas City, St. Joseph and elsewhere in Missouri for the products manufactured, prepared and sold by the respondents; that at said meeting so held from time to time as aforesaid, and for the purpose of controlling and monopolizing the market and preventing competition in the sale of dressed meat, cured meat, pork and lard, and in order that a common uniform price should be charged the retail butchers and the consuming public and all others in the state of Missouri by the agents of all the respondents for the same or similar grades of dressed beef, pork, cured meats and lard, the said officers, managers, and agents would agree upon the prices at which all the different classes and kinds of the products above mentioned should be sold in the state of Missouri."

The information then charges that, "the said prices which should be so charged in Missouri for the ³⁷¹ said different commodities having been agreed upon as aforesaid at the said meetings, all the officers, managers, agents and servants of respondents charged and intrusted with the sale to butchers and others of said products throughout Missouri were notified of the prices agreed upon for the period of time during which it had been agreed said prices should be charged, and that the officers, managers, agents and employés of respondents intrusted and charged with the sale to retail butchers, meat dealers, and all others of said products in Missouri, were directed and required to sell said products for said period theretofore agreed upon at the prices fixed and not below the said prices agreed upon at said meeting so held as aforesaid." The information then alleges that "after the prices to be charged had been fixed and agreed upon as aforesaid, the said officers, managers, agents and employés of respondents did not sell and have not sold any of the kinds, classes and grades of the products above mentioned, in this state to retail butchers, meat dealers and the consuming

public, except at the prices fixed and agreed upon." It is then charged that "the agreement and combination so made in the manner as aforesaid, has prevented and does prevent competition in Missouri among respondents and others engaged in the same line or lines of business in this state, and that said acts of respondents have deprived and do deprive the public of free, full and wholesome competition in the sale of the commodities above mentioned, to the great damage and detriment of the public."

Informant then charges that "the general nature and object of the said combination, pool, agreement and confederation so made as aforesaid by the said respondent corporations by the means and in the manner aforesaid, are:

"1. To fix, regulate, maintain and control by the respondents the price and prices to be paid for all classes, kinds, brands and grades of dressed beef, dressed ³⁷² pork, hams, bacon and all kinds of cured meats and lard, sold to the retail butchers and dealers in all kinds of fresh and cured meat and the consuming public in the cities of St. Joseph, Kansas City, St. Louis and throughout the state of Missouri.

"2. To maintain the said price or prices when so fixed as aforesaid to be paid for all classes, kinds and brands of dressed beef, dressed pork, hams, bacon and all other cured meats and lard by the retail butchers, dealers in meat and the consuming public in the cities of St. Joseph, Kansas City, St. Louis and throughout the state of Missouri; and

"3. That it is one of the objects of said combination, agreement, pool and confederation so made as aforesaid by the respondent corporations by the means and in the manner aforesaid to prevent, prohibit and avoid competition among themselves and others in the sale in Missouri of the said commodities dealt in and handled by the said respondents."

The information then charges that "the respondents by the means and manner aforesaid have obtained control of and monopolized to the exclusion of all others, the business of selling all classes and kinds and grades and brands of dressed beef, dressed pork, hams and bacon and cured meats and lard, to the retail butchers, dealers in meat and the consuming public in the state of Missouri to the great detriment of the public."

It is then charged that "by reason of the monopoly and control and exclusion of competition in the sale of said commodities aforesaid in the manner and means aforesaid, the respondents and their agents, officers and managers, have been

enabled and now are selling to the butchers and dealers in meat and the consuming public in Missouri, certain grades of dressed beef, pork, hams, bacon, cured meats and lard of an unwholesome and inferior quality, to the great detriment of the public."

³⁷³ It is then charged that "the purpose and intention of respondents have been and now are to willfully and unlawfully combine and confederate as aforesaid, with each other, to monopolize and control absolutely and prevent competition in the business of dressed beef and meats as aforesaid in the state of Missouri, and that said respondents are now willfully and unlawfully maintaining said illegal agreement and unlawfully and illegally fixing and controlling prices in the manner aforesaid for said commodities, and which said price for the aforesaid commodities so fixed by the respondent and others acting with them as aforesaid is the minimum price to be charged by respondents throughout the state of Missouri for the different classes, kinds, grades and brands of dressed meat and pork, hams, bacon and cured meats and lard, and that said prices so fixed as aforesaid are the minimum prices at which agents, employés and officers of respondents are allowed to sell said products throughout Missouri."

It is then charged that "by reason of the premises and facts aforesaid since the 21st of August, 1899, and up to the present time, respondent corporations have grossly offended against the laws of this state and willfully and flagrantly and grossly abused and misused their corporate authority and franchises and privileges, and have willfully and unlawfully assumed and willfully usurped authority and privileges not granted said corporations by the laws of Missouri, by entering into and becoming a member of and a party to said trust, combination, confederation and pool as aforesaid, to monopolize and control the business of selling dressed beef, dressed pork, ham, bacon and all cured meats and lard in the state of Missouri, and by means of said combination aforesaid to prevent competition in said business and to regulate, fix and maintain the price or prices to be charged retail butchers, dealers in meat and the consuming public for the aforesaid ³⁷⁴ products, and that in pursuance of the aforesaid agreement so made, respondents are now unlawfully and willfully monopolizing and regulating, fixing, maintaining and controlling the prices to be paid by retail butchers, dealers in meat and the consuming public for the products above mentioned, and that the action of the respondent corporations as hereinabove set out is a willful and malicious perversion of the

franchises granted to said corporations by the state of Missouri, and an illegal, willful usurpation of privileges not granted to them, and is a great and permanent injury to the public."

The prayer of the petition is "that respondent corporations, each and all of them, severally be excluded from all corporate rights and franchises under the laws of the state, and that their rights, authority, license and certificate to do business under the laws of Missouri be declared forfeited, and that each of them and every one of them be ousted from their several franchises, corporate rights and privileges."

The Krug Packing Company answered separately, denying generally the allegations of the information.

The other respondents answered jointly, setting up many specific defenses. On motion of the attorney general the court struck out all of the defenses except the sixth paragraph of the second defense pleaded, which "first alleged the corporate organization of each of the above-named Armour, Hammond and Cudahy and Swift packing companies as corporations and their right to do business in Missouri, and then respondents denied that they ever made or entered into an agreement, confederation, combination, pool or understanding, by and among either of them or any other person or corporation to regulate, fix and control the price to be paid by retail butchers or anyone else for any kind of pork, beef, cured meats or lard, slaughtered or manufactured, prepared or offered for sale or to be sold in the state of Missouri and elsewhere, ³⁷⁵ or to maintain or control the prices thereof in this state or to prevent competition in business between respondents and others engaged in like business, nor did respondents ever take any part in maintaining any such agreement, combination, pool or understanding. That none of the officers, managers, agents, servants or employés of this respondent at any time, with the consent of the respondent, or otherwise, agreed and combined to fix or maintain an agreed price of the products handled by respondents which should by respondents be sold or offered for sale to the retail butchers or others, or to the consuming public in Missouri, and that respondents never did agree upon or fix the prices at which they would sell in Missouri such products. Respondents then denied generally each and every allegation in the information contained except as in this paragraph 6 of the second defense admitted. Respondents then denied that they ever agreed, entered into, or became a member of or a party to any pool, trust, agreement or understanding with any other person or persons, or association of persons, to regulate and fix

the price of any article or commodity whatsoever, or the price to be paid therefor; respondents then deny that they were ever parties to any contract, agreement or combination, designed or made with a view to lessen, or which tended to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this state. Respondents then also denied that they had ever sold to anyone any kind of dressed beef, dressed pork, ham, bacon, cured meats and lard, which is or was unwholesome and of an inferior quality, and which was a detriment to the public.

It will be seen that this paragraph is in substance a general denial, and raised a general issue upon the pleadings.

All of the respondents, except the Krug Packing Company, which is a Missouri corporation, are corporations ³⁷⁶ organized under the laws of sister states, and have complied with the laws of this state with respect to foreign corporations, and have been licensed to do business in this state. Armour & Company has never done any business in this state, and never was a member of any pool or guilty of any of the acts charged. The Krug Packing Company is not shown ever to have been guilty of the acts charged. This proceeding is therefore quashed as to them, and in speaking of the respondents hereinafter, reference is had only to the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company and Swift & Company. Of these the Hammond Packing Company and Swift & Company have extensive packing plants at St. Joseph, Missouri. The Armour Packing Company and the Cudahy Packing Company have extensive plants in Kansas City, Kansas. Swift & Company, the Cudahy Company, the Armour Packing Company, have "coolers" in St. Joseph and St. Louis, and the Hammond Packing Company has a "cooler" in St. Joseph. The Armour Packing Company, the Cudahy Packing Company and Swift & Company, have no "coolers" in Kansas City, Missouri, but they sell their meats at their plants in Kansas City, Kansas, to the butchers and their customers in Kansas City, Missouri, and deliver them to said butchers and customers in Kansas City, Missouri.

Of the other corporations the persons alleged to have been with the respondents in the combination, Schwartzschild & Sulzberger Company had its plant in Kansas City, Kansas, and had "coolers" in Kansas City and St. Joseph, Missouri, and Nelson Morris & Company had their plant in East St. Louis, Illinois, and had "coolers" in St. Louis, Kansas City and St. Joseph.

The case was referred to Honorable I. H. Kinley, a member of the Kansas City bar, as special commissioner, to take the testimony and make and report a ³⁷⁷ finding of the facts, and with leave to the parties to file exceptions thereto.

The report of the special commissioner covers twenty-five printed pages and is too voluminous to be embodied herein. In brief, he finds:

1. That the respondents, together with Nelson Morris & Company, between August 21, 1899, and May 9, 1902, entered into "agreements, confederations, combinations and understandings between themselves, to fix, regulate and control the prices of dressed beef, and fresh pork, slaughtered, manufactured, prepared and offered for sale, or to be sold by respondents to the retail butchers and others at St. Joseph, Missouri, and that respondents, with Nelson Morris & Company, agreed among themselves and with each other to maintain and control the prices of such dressed beef and fresh pork, and that in pursuance of said agreements to fix, maintain and regulate the prices for which said dressed beef and fresh pork should be sold, said respondents above named, during said time between August 21, 1899, and May 9, 1902, have sold to the butchers at St. Joseph, Missouri, said dressed beef and fresh pork at the prices so fixed, regulated and maintained, except where such respondents gave rebates in money or in pounds of meat to their customers."

2. The commissioner makes a similar finding of fact as to dressed beef in St. Louis, except that he finds that the Hammond Packing Company did not do business in that city and was not in the combination, but that the St. Louis Dressed Beef Company was in the combination in that city with the respondents.

3. The commissioner finds that the respondents, and others, in St. Louis, "about 1899 or 1900, formed a voluntary association for the purpose of meeting once a week at some hotel or place designated and discussing and fixing the list prices to be charged the butchers for fresh pork, and at these meetings these representatives agreed among themselves and with ³⁷⁸ each other to maintain these prices as fixed under a penalty of paying a fine of five dollars for each sale under such fixed price. They employed a secretary at ten dollars per week, and paid the same by assessments on the members of the organization. These fines were expended for incidental expenses of the meetings and cigars. This organization, these meetings and agreements

were testified to by several who were parties thereto and participated in the agreements and fixed prices for which each should sell fresh pork to the butchers in St. Louis, and that in pursuance of said combination, agreement and conspiracy said respondents maintained the prices so fixed in selling such fresh pork to the butchers at St. Louis, except where the prices were cut as aforesaid, and those testifying stated that they did not keep such agreements, and did not intend to when they were made, and the most of the witnesses testified that the prices agreed on were reasonable."

4. The commissioner finds that the respondents at St. Joseph, St. Louis and Kansas City sell to the trade from sixty-five to eighty per cent of all the dressed beef, and from fifty to sixty per cent of all the dressed pork that is handled in those cities, but that such sales amount to "comparatively a very small portion of their business in selling fresh beef, fresh pork and provisions throughout this and foreign countries."

5. The commissioner finds that as soon as the attorney general began the initiatory steps in this case all of the respondents abandoned all of the said combinations.

6. The commissioner finds that at St. Joseph and St. Louis, after meat had been in the coolers a certain length of time, the owners were allowed to sell it at a price less than the price fixed, and this is what is termed "concession meat."

7. The commissioner excluded evidence showing that if a butcher did not pay his bills to the respondent ³⁷⁹ with whom he dealt by Wednesday of each week, he was put on the C. O. D. list of all the respondents and persons in the combine, and that the members of the combine had a meeting every Wednesday night to hear such reports and make such order.

8. Over the objection of the attorney general the commissioner permitted the respondents to show how the cattle business in Kansas City had increased from \$4,210,605 in 1890 to \$1,655,966,699 in 1901, but afterward excluded all except what related to the years 1899, 1900 and 1901. The commissioner also allowed the respondents to show the number of animals the respondents killed, the number of persons they employ, and the amount they pay for salaries and expenses. He refused to allow the respondents to show by various cattle-raisers that the cattle-raising business has become more profitable since the respondents have been engaged in business, and that it would be injured if the respondents were ousted from doing business in this state.

Both sides have filed voluminous exceptions to the findings of fact by the commissioner. The case has been argued orally at length and exhaustive briefs have been filed. The evidence has been printed in full, covering two volumes aggregating nine hundred and forty-nine pages, while the brief of the informant covers one hundred and six printed pages, and the two briefs of the respondents cover two hundred pages.

1. The statute of this state (Rev. Stats. 1899, sec. 8965), relating to "Pools, Trusts and Conspiracies," makes it unlawful for any persons, associations, partnerships or corporations to become a member of or a party to "any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual or any other person or association ³⁸⁰ of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated, or fixed," or to enter into any such pool to fix or limit the amount or quantity of any such articles. Section 8966 prohibits any combinations that are designed or tend "to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this state." And section 8971 punishes the violation of the law by a forfeiture of the corporate rights and franchises, if it be a home corporation, or a forfeiture of its right to do business in this state if it be a foreign corporation. Other penalties and forfeitures are imposed by section 8968, but are not involved in nor sought to be enforced in this proceeding.

The commissioner reported that over the objections of the respondents he had admitted "the statements and admissions of the managers of these coolers and solicitors of respondents, showing that such combinations and agreements to fix and regulate prices as aforesaid had been made and entered into by respondents; without such testimony it is doubtful if the existence of such combination could be found, but if such statements and admissions are admissible, as I have ruled them to be, then" he found that the respondents were guilty.

To appreciate the force of what is thus said it is necessary to understand how the respondents did business in this state. Great care has been taken to show that the business done by the respondents in this state is but an "infinitesimal" portion of the total business it does all over the world. The business

done in this state is not done from the slaughtering or packing plants of the respondents, nor is it conducted or ³⁸¹ personally managed by any of the higher officers or agents of the respondents, but it is all done through "coolers" and the agents of the respondents who manage the "coolers" and transact the business.

The commissioner finds the facts in this regard, and the conceded facts show the finding is correct, to be as follows: "A 'cooler' as shown by the testimony, consists of two or more rooms, at least one of which is refrigerated, the temperature being kept down from about thirty-four to forty degrees Fahrenheit; fresh meat is taken from the packing-house and placed in this refrigerating room for sale to the butchers in the city where the cooler is located. As a rule the packers only sell to the butchers, who sell to the public from their shops. At each cooler is a 'cooler manager' in charge thereof, one or more city solicitors, who solicit trade of the butchers, and a driver, who, from a wagon driven by him, delivers the meat to the butcher, who has purchased it. As a rule the butcher goes to the 'cooler,' inspects the carcass he wishes to buy, and if it suits him he purchases it and it is delivered to him at his shop, and he pays therefor at the cooler."

In other words, the purchasers deal exclusively with either the solicitors, who urge them to buy, or with the manager of the cooler. The drivers, of course, only deliver the goods. There is also a bookkeeper or cashier and an auditor at each cooler, who are subordinate to the manager, but in referring to the statements and admissions of the agents of the respondents these subordinate agents are not intended, but the managers of the coolers and the solicitors or salesmen are alone referred to.

The statements and admissions referred to were made by the solicitors when engaged in the business of soliciting orders from the retail butchers, and related to the prices at which sales could be made and the reasons for such prices, and to schemes and subterfuges for billing the goods at a price stated or as of certain ³⁸² quantities and afterward giving a rebate of the price or for sending more meat than the bills called for—or, as it is termed by the witnesses, of allowing a rebate in cash or in pounds of meat—or they were made by the managers of the coolers when engaged in making sales or when allowing such rebates. They were, therefore, statements made by these persons who were employed by the respondents, and who transacted all the respondents' business of selling in this state, were made

while so engaged, and related to the business being transacted. They were, therefore, statements of agents touching the business of the principal then being transacted by such agents, and such agents were the only representatives of the respondents that the buying public ever saw or dealt with. They quoted the prices to the public. They made and carried out the arrangements for rebates. They delivered the goods and collected the bills. They were, therefore, statements made by the authorized representatives of the respondents, while in the transaction of their business and touching the business. They were, therefore, admissible in evidence, and were just as binding upon the respondents as if those statements had been made by the highest officer of the company or had been solemnly adopted by the directors or stockholders of the company and entered on the minutes of their meeting: *Northrup v. Mississippi Val. Ins. Co.*, 47 Mo. 442, 4 Am. Rep. 337; *Western etc. Ben. Assn. v. Kribben*, 48 Mo. 41; *Adams v. Hannibal etc. R. R.*, 74 Mo. 553, 41 Am. Rep. 333; *Boogher v. Life Assn. of America*, 75 Mo. 324; *State v. Aetna Ins. Co.*, 150 Mo. 133, 134, 51 S. W. 413; *Nickell v. Phoenix Ins. Co.*, 144 Mo. 420, 46 S. W. 435; *State v. Fireman's Fund Ins. Co.*, 152 Mo. 38, 52 S. W. 595.

The testimony introduced by the state was abundant to show that the respondents were members of a combination or pool to fix and maintain prices. The state called as witnesses nine butchers who did business with the respondents in St. Joseph, whose testimony showed that they all got rebates in money or pounds ³⁸³ of meat from the respondents, and that in every instance they were given by the solicitors or cooler managers, who said they could not sell the meat for less than a certain price, because all of the respondents had an agreement as to prices which was fixed every Wednesday by the head men of the packing plants, and the prices—given by them to the cooler managers on Thursday—by the cooler managers and solicitors were given to the trade, and that if anyone cut the price he would be fined, so they circumvented their fellow-conspirators by giving rebates as herein described. That such a combination existed at the time charged in this case is further shown by the facts and circumstances outside of any admissions and statements of the agents of the respondents. The witnesses testified that they had tested the various respondents by going to the several coolers of the different respondents, on the same day, and trying to buy cheaper from one than was offered them by another, and in every instance they found the prices to be ex-

actly the same at all of the coolers. It further appeared that on various occasions a manager or solicitor ascertained that a purchaser had gotten a rebate from one of the other companies, and he would immediately secure from the customer the papers showing the rebate and take them away with him, and afterward the agent of the company that had granted the rebate complained that the purchaser had gotten him into trouble by allowing the fact to become known. In fact, it appears that in every instance when a rebate was granted, secrecy was strictly enjoined upon the customer. It further appeared that on various occasions the cooler managers or solicitors would tell the butchers they had better lay in a supply of meat before a certain day, as the prices would go up on that day, and that in every instance the prices did go up uniformly at the time specified, at all the coolers of all the respondents. It further appeared that at all of the coolers "concession meat," ³⁸⁴ as it is called, was sold. By "concession meat" is meant meat that has remained so long on hand in the cooler that it has become discolored or moldy, or not exactly what would be termed as first-class, but, as some of the witnesses call it, unfit for sale, but not exactly unfit for use after it had been trimmed up. When any cooler had such meat on hand, the manager of another or of other coolers would be called in and they would examine it, and if they believed it to be of such a character, they would "concede" to the manager of the cooler having such meat the right or privilege to sell it for a price less than the agreed price. The manager who had obtained such concession would then sell it or try to sell it to the trade, at such price as he could get for it.

It further appeared that no butcher could buy meat from any packer that did not do business in St. Joseph, because packers located elsewhere refused to sell to them, stating as a reason that St. Joseph was the respondents' territory and such outside packers were afraid to invade their territory.

It further appeared that when the attorney general took the initiatory steps in this case, the respondents immediately dissolved, discontinued and stopped the pool and combination arrangements.

The state called eleven witnesses in St. Louis, butchers, city meat inspectors and former managers of the respondents' coolers, who testified to the same facts, circumstances and conditions in St. Louis, as to dressed beef in St. Louis. As to dressed pork the state called five witnesses, who were themselves members of such a pool, trust or combination, who testified that the respond-

ents (except the Hammond Packing Company) were also members of the pool; that the representatives of the pool, trust or combination met every week at either the Southern or Lindell Hotels; that the prices were fixed by an arbitrator named McCall, who was paid a salary of ten dollars a week, ³⁸⁵ raised by assessment on all of the members, and if anyone cut the prices he was fined five dollars; that the combination ran for two or three years and until the institution of this suit, when it was abandoned. As to the existence of a combination as to dressed pork, therefore the facts and circumstances show it as plainly as they do in regard to dressed beef, and in addition five of the conspirators testified directly to it.

It is quite too plain for doubt that persons or companies who are engaged in the same line of business, in the same place, do not bill goods at one price and give rebates in money or goods or weights, and do not give notice of a uniform advance of rates at a certain date, always followed by such a rise, and do not maintain a uniform selling price, and do not call in their competitors to get them to "concede" to them a right to sell shopworn or old goods at a price less than such uniform price, and do not gather up papers or bills of their competitors showing that they have been selling below a certain price, and do not abandon, dissolve and discontinue their understandings or combinations as soon as the legality thereof is called in question by the state's officers, unless there has been an unlawful pool, trust or combination to fix and maintain prices. Such acts and circumstances and practices speak as loudly, as directly and as certainly, and tell as strong and conclusive a tale of wrongdoing in those regards as any witness could possibly testify to it or any resolution formally adopted by the directors or stockholders could prove it.

Independent, therefore, of any admissions or statements of the managers of the coolers or of the solicitors, which, however, were clearly admissible, the state has made out a case against the respondents under the facts and circumstances of the case. The commissioner, therefore, reached the right conclusion, and properly followed the rules of law as to the admissions ³⁸⁶ and statements of the managers of the coolers and solicitors, as laid down in the cases hereinbefore cited, but he was in error in saying that outside of such admissions and statements it is doubtful if the charges against the respondents could be sustained.

As against all such direct testimony, admissions and statements the respondents offer no proofs, call no witnesses, and re-

main absolutely mute. They do not even do, as was done in *State v. Fireman's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595, call the chief officers of the conspirators and show that they never knew of nor authorized any such arrangements or combinations by their agents. They do not show or pretend that they have not reaped the benefits of such arrangements or combinations for all the years they existed. They simply let the state's showing stand uncontradicted, and content themselves with claiming that the admissions and statements were not made at the time the agents were engaged in transacting the business they were given power to transact, but were made before or after the said time, which an analysis of the evidence shows is not the fact, and with further showing how their business has increased in the last ten years, how many persons they employ, how much wages they pay, how the cattle-raising business has increased since they began business, and how it would be injured if they are ousted of their right to do business in this state, how they regulate their prices by the price of cattle, how much loss the resident companies would suffer by reason of not being allowed to operate their plants, how the butchers in St. Joseph are as bad as they are, and worse, because while they sell concession beef to the butchers at reduced prices, and give butchers rebates to get their trade from each other or to retain their trade, the butchers do not sell concession meat any cheaper to the public, nor do they give the public the benefit of any rebates, and that the butchers belong to a union, which fixes the price of meat for ³⁸⁷ the consumers and keeps newcomers out of the trade, and prohibits or tries to prohibit the packers from selling directly to the trade, and that as to the dressed pork combine in St. Louis, it was never lived up to, and never was intended to be lived up to, and the members were false to their trust agreements so often that they could not make the combination effective.

None of these matters constitute any defense or bar to this action. The commissioner admitted the testimony bearing on most of these matters for the purpose of enabling the court to be fully advised as to all the conditions when it came to fixing the punishment to be imposed.

"Competition is the life of trade." Pools, trusts and conspiracies to fix or maintain the prices of the necessities of life, strike at the foundation of government; instill a destructive poison into the life of the body politic; wither the energies of competitors; blight individual investments in legitimate business;

drive small and honest dealers out of business for themselves, and make them mere "hewers of wood and drawers of water" for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate and wholesome food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business, and make them breadwinners while they are yet almost infants, because the head of the house cannot earn enough to feed and clothe his family.

The people are helpless to protect themselves. The powers that be must protect them, or as surely as history records the story of republican government in Rome, so surely will the foundations of our government be shaken and its perpetuity threatened. Missouri (*State v. Fireman's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595), New York (*People v. Sheldon*, 139 N. Y. 388 251, 36 Am. St. Rep. 690, 34 N. E. 785), Pennsylvania (*Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159), Ohio (*Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666), Kentucky (*Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670), Iowa (*Chapin v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297, 48 N. W. 1074), Illinois (*Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 888), Wisconsin (*Milwaukee Builders' Assn. v. Niezerowski*, 95 Wis. 129, 60 Am. St. Rep. 97, 70 N. W. 166), California (*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581), Texas (*Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. 274), Louisiana (*India Bagging Co. v. Kock*, 14 La. Ann. 168), and the supreme court of the United States (*United States v. Trans-Missouri Freight Assn.*, 171 U. S. 558, 17 Sup. Ct. Rep. 540), have held statutes which prohibited such combinations or trusts to be constitutional, and further, that all such combinations or agreements are against public policy and void at common law, and as a matter of American common law, irrespective of whether there is any statute on the subject or not.

The rule is well stated in the syllabus to *People v. Sheldon*, 139 N. Y. 251, 36 Am. St. Rep. 690, 34 N. E. 785: "A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity [the combination was to fix and maintain the price of coal] is, in the contemplation of law, an act inimical to trade or commerce, without regard to what may be done under and in

pursuance of it, and although the object of such a combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices; where it appears that the parties acted under the agreement, an indictment for conspiracy is sustainable."

The court further aptly says: "But the question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, Was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition ³⁸⁹ among the coal dealers, one upon which the law affixes the brand of condemnation. It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the 'exchange' was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified in case of persistent default by the member that 'he is not entitled to the privileges of membership in the exchange.' No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange.

"The cases of *Hooker v. Vanderwater*, 4 Denio, 349, 47 Am. Dec. 258, and *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court, in those cases, held that the agreements were void, on the ground that they were agreements to prevent competition, and the doctrine was affirmed

that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious ³⁹⁰ to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition: See, also, *People v. Fisher*, 14 Wend. 10, 28 Am. Dec. 501; *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190. The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal and justified the conviction of the defendants."

³⁹¹ In *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843, 24 N. E. 834, it was held, as stated in syllabus, that "as corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their functions, maims and cripples their separate activity, and takes away free and independent action, affects un-

favorably the public interests." Accordingly, where a number of persons, including the defendant in that case, entered into an agreement, the purposes of which were declared to be: "1. To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit; 2. To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar; 3. To furnish protection against unlawful combinations of labor; 4. To protect against inducements to lower the standard of refined sugar; 5. Generally to promote the interests of the parties hereto in all lawful and suitable ways"—and each of the parties transferred all its shares of stock to a board and the board managed the whole business, it was held to be against public policy, in restraint of trade and void.

It is not essential that the combination or trust shall constitute a complete monopoly. For as was said by Mr. Chief Justice Fuller, in *United States v. Knight*, 156 U. S. 16, 15 Sup. Ct. Rep. 255: "Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result shall be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

As was well said by Best, C. J., in *Homer v. Ashford*, 3 Bing. 326: "The law will not permit anyone to restrain a person from doing what his own interests and the public welfare require he should do."

³⁹² If it be true that a combination or trust among the respondents has increased the cattle business in this state, and has encouraged the stock-raising business, and its prohibition hereafter will injure or destroy such business, or if such trust arrangements have given employment to so many people and put in circulation so many millions of dollars of money in this state, or if it be that the home corporations would lose their plants entirely if their franchises were taken away from them, such considerations would not amount to a defense, or excuse for the offense charged. They are matters that should have been thought of before the offense was committed. So long as the law puts the stamp of condemnation on all arrangements, agreements, pools, trusts and conspiracies to fix and maintain the prices of articles of prime necessity, the courts have no option but to enforce the law.

The wisdom and experience of all ages and all people have demonstrated the necessity for such laws, and for the rigid enforcement of them. And even after so many years of unfailing enforcement of such laws, the terrors and consequences thereof have not been sufficient to deter people from violating them.

The conclusion is irresistible that the defendants are guilty of being members of a trust, pool or conspiracy to fix and maintain the prices of dressed beef and dressed pork in this state at the times charged in the petition, except, as before stated, Armour & Company and the Henry Krug Packing Company, as to whom the writ must be quashed.

2. This leaves only the question of punishment. The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of (*State* ³⁹³ *v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593; *State v. Portland Natural Gas etc. Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 N. E. 1089; *State v. Cincinnati etc. R. R. Co.*, 47 Ohio St. 130, 23 N. E. 928; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. 279; *Yore v. Superior Court*, 108 Cal. 431, 41 Pac. 477; *State v. Norwalk etc. Turnpike Co.*, 10 Conn. 167; *State v. Topeka*, 30 Kan. 653, 2 Pac. 587; *People v. Rensselaer etc. R. R. Co.*, 15 Wend. 113, 30 Am. Dec. 33; *Commonwealth v. Delaware etc. Canal Co.*, 43 Pa. St. 301); or it may be a suspensive judgment of ouster with a fine accompaniment (*State v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595); or it may be a simple fine if it appears that the trust, pool or conspiracy complained of and proved, has been abandoned. In short, the character of the judgment rests in the discretion of the court: 5 *Thompson on Corporations*, sec. 6812; *Weston v. Lane*, 40 Kan. 479, 10 Am. St. Rep. 224, 20 Pac. 260; *State v. Omaha etc. R. R. Co.*, 91 Iowa, 517, 60 N. W. 121; *State v. Bernoudy*, 36 Mo. 281.

Under all the circumstances, a judgment of absolute ouster is not necessary, but the ends of justice will be satisfied by the imposition of a fine, and the payment of all the costs in the case. It is accordingly ordered that the respondents, the Armour Packing Company, the Hammond Packing Company, the Cudahy Packing Company and Swift & Company, each pay to the clerk of this court, within thirty days from this date, the sum of five thousand dollars as a fine, and that they also pay the costs in this case. And it is further ordered that if

the respondents, or any of them, fail to pay said fine, and costs, within said time, then they or those so failing be ousted of all rights, privileges and franchises of every nature and kind conferred upon them by the laws of this state, and be forever prohibited from doing business in this state.

All concur.

Unlawful Trade Combinations are considered in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273, and the subsequent cases of *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 85 Am. St. Rep. 125, 28 South. 669; *Peters v. Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, and cases cited in the cross-reference note thereto; *Park & Sons Co. v. National Wholesale Druggists' Assn.*, 175 N. Y. 1, post, p. 578, 67 N. E. 136.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

MEYER v. MADREPERLA.

[68 N. J. L. 258, 53 Atl. 477.]

APPEAL.—In Reviewing the Action of a Trial Court in Controlling a Verdict by a peremptory instruction, the question is whether, upon the testimony presented, a jury could find a contrary verdict, which, in the exercise of a sound legal discretion, must be supported by the court in which judgment is sought and upon which judgment must follow. (p. 537.)

EVIDENCE.—The Presumption of Death from Seven Years' Absence, under the New Jersey death act, is not one of fact, but of law, which stands as proof of death, and fixes the time of death at the expiration of the seven years. (p. 541.)

VENDOR AND VENDEE—Good Title.—There is an Implied Agreement on the part of a vendor, in every contract for the sale of land, to make good title to the vendee. (p. 542.)

SPECIFIC PERFORMANCE—Sufficiency of Title.—A purchaser will not be compelled to take a conveyance of land if there is a reasonable doubt about the title. There may be a good title at law which a court of equity will not force on an unwilling purchaser. (p. 543.)

VENDOR AND VENDEE—Good Title at Law.—In actions at law the implied agreement for title in a contract for the sale of land will be satisfied by a good title at law, under the evidence adduced. (p. 544.)

VENDOR AND VENDEE.—A Want of Good Title is not Made Out by the vendee, in an action for breach of contract to convey, by showing that the conveyance tendered does not convey the title of a certain person to a small undivided share of the lands, when such person has been absent and unheard of since 1879, and can have no interest in the property unless he was alive in 1890. (pp. 541, 544.)

Samuel A. Besson, for the plaintiffs in error.

Charles L. Corbin, for the defendants in error.

259 MAGIE, C. The return to the writ of error in this cause discloses an action on contract, in which, by various **260** counts, the plaintiffs seek relief for the breach of a contract, in writing, for the sale of land by defendants to them. The claim of damages for such a breach is limited to the return of the payment made by plaintiffs upon the contract and the expenses of examining the title to the land. By appropriate pleas defendants deny the breach of the contract, and the cause being put at issue thereon a verdict was rendered for the defendants.

The bill of exceptions discloses that the verdict for defendants was directed by the trial judge, to which direction exception was duly taken. The assignment of error upon that exception raises the only question which has been argued and presented for decision.

In reviewing the action of a trial court in controlling a verdict by a peremptory instruction, the question is whether, upon the testimony presented, a jury could find a contrary verdict, which, in the exercise of a sound legal discretion, must be supported by the court in which judgment is sought and upon which judgment must follow: *Crue v. Caldwell*, 52 N. J. L. 215, 19 Atl. 188; *Newark Passenger Ry. Co. v. Block*, 55 N. J. L. 605, 27 Atl. 1067; *Meyers v. Birch*, 59 N. J. L. 238, 36 Atl. 95; *American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417, 38 Atl. 662; *Coyle v. Griffing Iron Co.*, 63 N. J. L. 609, 44 Atl. 665; *Lippincott v. Supreme Council Royal Arcanum*, 64 N. J. L. 309, 45 Atl. 774.

The review of a direction of a verdict for defendant involves, therefore, a consideration of what the plaintiff was required to prove to maintain the issue presented by the pleadings and what the proofs were.

To maintain the issue in this cause it is obvious that plaintiffs were required to prove that defendants made the contract on which the action was based; that defendants had broken the contract, and that the damage claimed, or some part thereof, had resulted.

The facts upon which the issue was tried and disposed of by the direction complained of were made to appear in part by a written stipulation of counsel and in part by the evidence of witnesses duly called and examined. There was no conflict or contradiction in respect to the facts.

It is conceded that it was thereby established that defendants **261** entered into a written contract to sell and convey,

"free and clear," to plaintiffs the lands in question for the consideration of nine thousand dollars, of which sum five hundred dollars was paid by plaintiffs to defendants, and that the reasonable expense of a search of the title to said lands was one hundred dollars.

As the existence of the contract thus sued upon was thus shown, and there was evidence as to the quantum of damages if defendants had broken it, the direction of a verdict for defendants can only be supported upon the ground that there was no proof of a breach of the contract sufficient to warrant the jury, if the case had been submitted to them, in finding for plaintiffs and sufficient to require such finding to be supported.

There was no contention that plaintiffs had rescinded or repudiated the contract because of actual or constructive fraud on the part of defendants. There were no facts shown that would have justified such contention. The sole contention was, and is, that defendants broke the contract by refusing to convey to plaintiffs such title to the lands in question as they had contracted to convey. The evidence contained in the bill of exceptions on this matter is rather meager, but it is deemed to be sufficient to justify the inference that plaintiffs duly demanded of defendants a conveyance of the lands pursuant to the contract; that defendants duly tendered a conveyance thereof, and that plaintiffs refused to accept the conveyance tendered, on the ground that it did not convey such title to the lands as defendants had contracted to convey or as plaintiffs were bound to accept.

While it was, and is, conceded that the conveyance assumed to have been tendered by defendants would have passed to plaintiffs a very large, though undivided, share of said lands, the contention was, and is, that it did not convey the title of one Patrick McDermott to a small undivided share thereof, or debar Patrick McDermott, if living, from claiming and enforcing his right thereto.

The contention on the part of defendants is that, upon the uncontroverted facts, no title in Patrick McDermott has been made out in proof.

²⁶² The facts upon which these respective contentions are made must be briefly stated to enable our conclusions to be understood.

The land in question was formerly owned by John McDermott, who died testate, seised thereof, on October 26, 1885. He had several children, all known to be then living, except a

son named Patrick, who, in 1879, was unmarried and residing with his father in this state. He was a common sailor, and in September of that year left his residence here and went away and had never afterward been heard from. By the will and codicil of John McDermott he bequeathed and devised his whole estate to trustees, upon certain specific trusts, which it is unnecessary to describe more particularly that to say that the trustees were to pay the income of various shares of the property to the respective known living children of testator for their lives, with a remainder over of each share. With respect to Patrick, the trustees were directed to pay him the income of one-tenth of testator's estate if he should, within five years after testator's death, return to claim it, with a provision that if he did not appear within that time the trustees were to assume that he was dead, and to divide the income between a daughter Mary and a son William, and after their deaths the one-tenth under that provision was to go, one-half to the brothers and sisters of Mary and one-half to the children of William, or, in default of children, to his brothers and sisters. By the codicil the provision for the ultimate disposition of that one-tenth was altered, so that, in case Patrick should not return to claim what had been devised and bequeathed to him within five years after testator's decease, it should be equally divided between testator's daughter Susan and his son William.

It further appeared that one of the parties interested, on January 20, 1893, filed a bill in the court of chancery for the partition of the land in question, to which all the persons in interest were made parties, except Patrick, who, it was therein charged, had never appeared to claim his income within the five years succeeding his father's death, and had been absent and unheard from for over seven years, and therefore, ²⁶³ under the statute, was presumed to be dead. The right to partition was contested, but was determined in favor of the complainant: *Rearty v. Smith*, 53 N. J. Eq. 253, 31 Atl. 1031. Such proceedings were thereupon had that, under a decree of that court, a master made sale and conveyance of the land in question to Stefano Madreperla, one of the defendants, who, it is admitted, took title to the lands and went into and continued in possession.

Upon these facts it is entirely clear that Patrick took nothing in the lands by descent from his father, for the latter devised the whole thereof. It is equally clear that, under the provisions of the will and codicil in which he is expressly

named, Patrick took no interest therein, because it is established, by the admissions and proofs, that he did not appear to claim the benefits thereby provided within the five years after testator's death, and, upon that failure, the devise went to the persons appointed to take the same in that event.

Upon an examination of the will and codicil, I think, however, that plaintiffs may raise the question which they presented below and now argue here.

Although Patrick took nothing by descent from his father, or under the express provisions in his favor contained in his father's will, yet, if he were, in fact, living at the death of his brother Michael, he would have become entitled to a share of the share in which Michael had a life interest. For, by the provisions of the will, the trustees were directed to pay three-twentieth parts of the net income of the estate to testator's son Michael, and the testator therein devised and bequeathed three-twentieths of his estate, after the death of Michael, to the child or children of Michael, but, in case he should leave no child or children surviving him, then to his brothers and sister, share and share alike, and, "in case any of them should be dead leaving issue, such issue to take the deceased parent's share." As Patrick, when he went away, was unmarried, his status as a single person is presumed to have continued, no contrary proof being adduced, and his presumptive death is accompanied by the presumption that he left no lawful issue. But if he were living at Michael's death, he would be one ²⁶⁴ of the brothers interested in the three-twentieths above mentioned. Under the provisions of the will, it is possible that Patrick, if living at the death of other of the beneficiaries, might be also interested in other shares, which were disposed of under similar provisions. Michael died intestate and unmarried on October 26, 1890. I think it may be assumed that he left no issue.

By the stipulation of the parties it is agreed that Patrick absented himself from this state and from the place of his last-known residence for the period of seven successive years, and that he has not been heard from since he left. These conceded facts make applicable the provisions of the act entitled "An act declaring when the death of persons absenting themselves shall be presumed," originally passed on March 7, 1797, and continued, with various immaterial amendments, in force to the present time: Gen. Stats., p. 1185.

The presumption of the continuance of the life of a person shown to have been once living, in the absence of contradictory proof, seems not to have been limited, at common law, by

any definite rule. But such a presumption was always assailable by evidence that the person had absented himself from his usual place of residence, and had not been heard from by those to whom his continued existence would naturally have been known. If evidence of absence unheard from for a period of seven successive years was adduced, it seems that the presumption of continued existence ceased, and that a presumption of death arose, which, in the absence of counter-proof, would prevail. Whether the presumption of death, upon such proof, was one merely of fact, or a presumption of law, was made a question: 2 Greenleaf on Evidence, sec. 278; 1 Taylor on Evidence, sec. 220.

By the construction given by our courts to the death act, above cited, I apprehend that it has been properly determined that proof of the absence of a person, whose existence is in question, from the state or from his last-known residence for the period of seven successive years defeats the presumption of continuance in life, and raises a counter-presumption of death. This counter-presumption of death is not a presumption ²⁶⁵ of fact, but a presumption of law, which, in the absence of proof rebutting such presumption, stands as proof of death. The presumption raised by the statute, upon such proof, is not mere presumption of death, but is also a presumption fixing the time of death at the expiration of the seven successive years of absence unheard from: *Wambaugh v. Schenck*, 2 N. J. L. (229) 167; *Smith v. Smith*, 5 N. J. Eq. 484; *Osborn v. Allen*, 26 N. J. L. 388; *Clarke v. Canfield*, 15 N. J. Eq. 119; *Hoyt v. Newbold*, 45 N. J. L. 219, 46 Am. Rep. 757.

As the stipulation of the parties established the fact that Patrick had absented himself from the state and from his last-known place of residence in the month of September, 1879, and had not been since heard from, the presumption of the statute arose, and no rebutting evidence having been produced, such presumption was conclusive proof of Patrick's death in 1886, on some day of the month of September, not later than the last day of that month.

Upon these admissions it is apparent that plaintiffs had not shown that Patrick had any title to any share of the land in question, because it was also admitted that Michael and all others of the brothers and sisters of Patrick died after the year 1886.

But it is contended on the part of plaintiffs that, although the conceded facts required the conclusion that the title of defendants to the land in question was not shown to be defective

in the respect complained of, yet that it was erroneous to direct a verdict for defendants, because, upon those facts, the title which plaintiffs would acquire by defendants' conveyance would be an unmarketable title, which would not be forced upon a purchaser under a bill for specific performance.

The unmarketable quality of the title is supposed to result from the fact that the death of Patrick in September, 1886, is established by statutory presumption, which would afford no protection to the purchaser if Patrick should hereafter appear to have been living. The statute which creates the presumption contains a proviso for the restoration of an estate recovered upon the presumptive proof of death to the person ²⁶⁶ who was evicted therefrom upon proof that he was, in fact, living.

In every contract for the sale of lands there is an implied agreement on the part of the vendor to make good title for the lands to the vendee: *Lounsbery v. Locander*, 25 N. J. Eq. 554. Failure to convey a good title will be a breach of the contract, and if vendor's title is, in fact, defective, an action will lie. An agreement to convey land "free and clear" is satisfied by a conveyance passing a good title.

When, upon bills for the enforcement of the performance of contracts for the sale of lands, the title to the lands was questioned, the court of chancery was originally accustomed to determine whether the title was good or bad, and to enforce the contract or dismiss the bill accordingly. But there grew up the practice of considering upon such bills, not merely the question whether the title was good or bad, but also whether it was free from reasonable doubt. This practice is said by Mr. Pomeroy to have originated under Sir Joseph Jekyll and Lord Thurlow, and the English reports abound in cases in which the court of chancery refused to require the purchaser to take a conveyance of the land if there was a reasonable doubt about the title, and it was always held that a reasonable doubt was disclosed if it was such as would affect the salability of the land if the purchaser should desire to sell it: *Pomeroy's Specific Performance*, sec. 199; *Fry's Specific Performance*, c. 17.

Mr. Pomeroy states the practice in such cases thus: "In suits by a vendor the purchaser will not be forced to complete the contract unless the title is free from reasonable doubt. This requirement should be carefully distinguished from the objection that, as a matter of fact established by the proofs, the vendor has no title at all, or has only a partial or defective one—an objection which, if well founded, will, as a matter of law,

either totally defeat a specific performance' or render its performance partial. . . . The rule now to be discussed differs in every respect from this. It assumes that the question whether the vendor's title is valid or imperfect is not definitely passed on by the court. If, however, there arises a reasonable doubt concerning the title, the court, without ²⁶⁷ deciding the question, regards its existence as a sufficient reason for not compelling the purchaser to carry out the agreement": *Pomero's Specific Performance*, sec. 198.

This practice has, from the earliest times, been pursued in our court of chancery. Upon bills for specific performance of such contracts a bad title would afford a complete defense. An adjudication that the title was bad, upon such a contest, would probably settle the question as between the parties. But the court has, in its discretion, when there appeared debatable grounds for a doubt that could not be settled without litigation, or which would expose the purchaser to the hazard of litigation, declined to compel him to perform. Chancellor Runyon pointed out this distinction when he declared that there might be a good title at law which a court of equity would not force on an unwilling purchaser: *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Tillotson v. Gesner*, 33 N. J. Eq. 313; *Cornell v. Andrew*, 35 N. J. Eq. 7; *Cornell v. Andrus*, 36 N. J. Eq. 321; *Paulmier v. Howland*, 49 N. J. Eq. 364, 24 Atl. 268; *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305; *Day v. Kingsland*, 57 N. J. Eq. 134, 41 Atl. 99.

Whether a bill by defendants praying that plaintiffs should be decreed to specifically perform this contract would have been dismissed upon the conceded facts of this case is open to question. The alleged flaw in the title consists in the possibility—it can hardly be called a probability—that Patrick may appear, or be shown to have been alive so as to have become interested in the share of Michael under the terms of the will. In respect to the doctrine that a purchaser will not be compelled to take a doubtful title, Lord Hardwicke observed that the "court must govern itself by a moral certainty, for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title": *Lyddall v. Weston*, 2 Atk. 20. And Mr. Sugden declared that a purchaser would not be permitted to object to a title on account of a mere probability, "because a court of equity, in carrying agreements into execution, governs itself by a moral certainty, it being impossible, in the nature of things, there should be a mathematical certainty of a

good title": Sugden on Vendors, 1st ²⁶⁸ ed., 214. In all deductions of title there are possibilities of error. A conveyance in the chain of title and necessary to its completeness, though appearing to be properly witnessed and acknowledged, and therefore capable of being proved by its production, or by its record under the statute, may afterward be shown to have been a forgery. A marriage essential to the descent of the land in the chain of title may afterward be shown to have been a meretricious union and its issue illegitimate. Proof that Patrick embarked in 1879 on a vessel, which was wrecked on a dangerous coast, and had not appeared or been heard of since that time, would raise a presumption of death without the statute, yet there would be a possibility that he escaped, and was yet alive. It may be well questioned whether any of such possibilities should deter a court of equity from enforcing the contract to purchase. Mr. Waterman, on a review of cases cited by him, declared that when the title rests on a presumption, and if the question were before a court of law, it would be the duty of the judge to direct the jury to find in favor of it, specific performance will be enforced: Waterman's Specific Performance, sec. 416.

Whether specific performance would have been decreed upon the facts disclosed in the bill of exceptions need not be decided. In actions at law the implied agreement for title in such a contract will be satisfied by a title good at law, upon the proofs under the rules of evidence. To recover at law for a breach of such a contract it must be shown that the title tendered was not a title good at law. The discretionary power of a court of equity with respect to a title which is doubtful, though good, is not within the province of a court of law, or a jury therein.

In states in which the jurisdiction of law and equity is mingled and administered by the same court the distinction in respect to relief in such cases has not been, and perhaps could not be, preserved. There are English cases indicating that the courts of law were at one time disposed to recognize the equitable doctrine in actions at law. In respect to those cases, Mr. Sugden remarks: "Whether courts of law were at liberty to follow in the footsteps of equity, and hold that a ²⁶⁹ title may be too doubtful to be forced on a purchaser, is a question on which eminent judges have differed with each other and even with themselves, but," he adds, "it appears to be ultimately settled that courts of law cannot adopt the equitable rule, and are bound to decide the legal question upon which the right to recover must depend": Sugden on Vendors, 8th ed., sec. 400.

The case upon which we must act involves the propriety of the direction of a verdict on uncontroverted facts which established, by the presumptions arising therefrom, that defendants had good title to the land plaintiffs had contracted to purchase. Whether the possibility that those presumptions might afterward appear to be erroneous would induce a court of equity, in its discretion, to deny specific performance or not, I think that the trial judge would have erred if he had submitted that question to the discretion of the jury. As the proofs made out a good title at law, the direction of a verdict for the defendants upon the issue made by the pleadings was proper.

The judgment must be affirmed.

A Good Title Means not merely a title valid in fact, but a marketable title which can be sold or mortgaged to a person of reasonable prudence: *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844, 22 N. E. 233. A marketable title is one free from reasonable doubt: *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634, 24 N. E. 195; *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527. See, also, *Mathews v. Lightener*, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992; *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038; *Simis v. McElroy*, 160 N. Y. 156, 73 Am. St. Rep. 673, 54 N. E. 674; *Simon v. Vandever*, 155 N. Y. 377, 63 Am. St. Rep. 683, 49 N. E. 1043. Equity will not compel the specific performance of a contract for the purchase of land if the title thereto is so uncertain as to affect the market value: *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736, 41 N. W. 1056. The plaintiff must show that the title is good beyond a reasonable doubt, but the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract to buy: *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460. But see *Herman v. Somers*, 158 Pa. St. 424, 38 Am. St. Rep. 851, 25 Atl. 1050.

HOLLER v. ROSS.

[68 N. J. L. 324, 53 Atl. 472.]

MASTER'S LIABILITY When Watchman Shoots Trespasser. One employed to watch the personal property of a company, stored upon the real property of another, does not act within the line of his duty if he shoots a person trespassing upon the realty, because the trespasser, when commanded, refuses to go off the premises or to halt or throw up his hands. (p. 548.)

MASTER'S LIABILITY for Act of Servant Outside His Duty.—A servant cannot bind his master to respond in damages to a third person, unless the act of the servant which caused the injury was expressly, or by necessary implication, within the line of his duty under his employment. (pp. 549, 550.)

MASTER'S LIABILITY for Willful Act of Servant.—The liability of a master for the willful, wrongful and malicious acts of his servant extends to every case where the act is done with a view to the furtherance and discharge of the master's business and within the scope of the employment. (p. 551.)

MASTER'S LIABILITY for Willful Act Outside Servant's Duty.—Where it appears, when the plaintiff rests his case in an action against a master for injuries caused by his servant, that the act of the servant was willful, and was not, expressly or impliedly within the line of his duty or employment, there should be a non-suit. (p. 552.)

Bedle, Edwards & Lawrence, for the plaintiff in error.

Young & Arrowsmith, for the defendant in error.

324 FORT, J. On the night of January 16, 1900, the plaintiff was shot in the face and back by the servant of the defendant. One of the results of the shooting was the loss of the plaintiff's eye.

The defendant was the owner of certain personal property stored upon a wharf, called by the witness a dock, which is situate upon the Jersey side of the Hudson river, near Fort **325 Lee**. The shooting occurred at about 6 o'clock in the evening. It was dark. The defendant did not own the wharf, and its personal property was only upon a part of the property. The servant was employed to watch the property of the defendant upon the wharf, to take care of it and see that it was not stolen. On the day of the shooting, prior to the time of shooting, three men had been to the wharf and been driven away by the defendant's servant. The men, as the plaintiff's case shows, had threatened to return and kill the defendant's servant. That same night the plaintiff, with two other men,

came to the wharf in a boat and tied it and climbed up the crib work upon it, and began to move around upon the filled work at the river front and back upon other parts of the property. The defendant's servant saw them, and surmised they were, or might be, the same three men who had been there before on that day in a boat and who had threatened to kill him. He armed himself with a shotgun, which he had upon the premises to shoot game, but which gun was not his master's, nor had it been furnished by his master, nor was the gun brought to the premises with his master's consent or knowledge. The servant testified for the plaintiff that he had used the gun to kill game in the daytime and had, at times, carried it at night. The servant further testified, in the plaintiff's case, on the plaintiff's examination, as follows: "Q. For what purpose was it—protection of what—that you fired? A. I was the man to know their business on that dock during that hour in the night. Q. For whom did you want to know that? A. For myself; nobody else."

The evidence of the person who owned the property, who was called by the plaintiff, was that the defendant was "merely allowed to use the dock property for storage, up to such time as I might rent the property or make use of it."

Adolph Aspen, one of the men who was upon the wharf with the plaintiff, testified for the plaintiff: ³²⁶ "Q. When he called, 'Hands up!' you three fellows all started to run? A. Yes, sir; I wasn't going to stand there like a monkey; I was scared, of course; I had four children and a wife home."

It further appeared on direct examination in the plaintiff's case, in the testimony of the servant, Anderson, as follows: "Q. Tell us what happened, and what you saw, and what you done. A. Before I spoke to them, I told them to hold up their hands and stop, and I told them to stop two or three times, but they did not—they did not stop; when one of them answered me, he says, 'Which way do you want me to run?' I says, 'Don't run at all'; I says, 'Go on the dock and stand still, so I can see who you are'; I called to them again—I called to them about four times before I shot; then I fired right straight over their heads. . . . Q. How many barrels? A. Only one the first time; then I called to them three or four times again and I went after them and I shot again. Q. What did you do that for? A. I wanted them men to halt."

Again this witness said: "Q. You told them to throw up their hands and stop—what did they do? A. Commenced to run."

The plaintiff also testified that he, with his companions, were upon the wharf to get some wood to heat coffee, and were there only seven or eight minutes before he was shot. Plaintiff was at all times quite a distance from, if not at, the time of the shooting, running away from the defendant's servant.

327 There is but one question in this case, viz., Is the defendant liable for the injuries done to the plaintiff by its servant, under the facts set out at the head of this opinion?

In an action of tort, in the nature of an action on the case, Judge Hoar says the rule is that "the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work": *Howe v. Newmarch*, 12 Allen, 49, 57.

The servant in this case was not employed to protect the wharf, but the personal property of the defendant upon a part thereof. The wharf itself did not belong to the defendant. A person employed to watch the personal property of a company stored upon the real property of another will not be deemed to be acting within the line of his duty if he shall shoot a person trespassing upon the realty, because that person refuses to go off the premises or to halt or throw up his hands upon his command. If the person shot had the personal property or some of it in his possession and refused to surrender it, or if he was in the act of taking it and refused to desist when commanded so to do, and he was shot by the servant, even though the shooting were wanton and willful, the master might nevertheless be liable. But that is not this case. There is no proof in this case that the plaintiff or those with him, were interfering in any way with the property of the defendant. They were simply upon the wharf to boil some coffee, and the servant of the defendant, without excuse or explanation, while they were engaged in gathering wood for this purpose, or while they were in the act of running away, shot and injured the plaintiff. It is difficult to see how such shooting can in any way be distinguished from the shooting by any stranger who might have happened to be on the wharf and tried to drive the men therefrom. There is no proof in the record that it was any part of the duty of the defendant's servant to keep persons off the wharf. In fact, the implication is entirely the other way. He was to watch the personal property of the defendant stored upon the wharf **328** to see that it was not taken away by persons who might come thereon for any lawful or other purpose.

Even where a watchman is given by the master a revolver to use in guarding property, it is held in *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537, that the master is not liable for injuries caused to a person who has been upon the property, but who is, at the time the shot is fired, off the property and fleeing away. In that case the court said: "To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom. The killing was not, therefore, done in the line of the duty Roenspeiss was employed to perform."

"It is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned by him": *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356.

The case at bar is not within the class of cases where the master is required by contract to protect the person assaulted by his servant, as in the case of passengers assaulted by railway employes: *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 15 Am. Rep. 953 (see note); *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 189, note 201.

The plaintiff and his companions were clearly technical trespassers upon the wharf property; neither he nor they had any contract or other legal relations with the defendant or indeed with the wharf owner.

The supreme court of Connecticut states the rule applicable to this class of cases about as clearly as it can be done, when it says: "For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances ³²⁹ under which the act is done, the master is responsible; for acts which are not within these conditions, the servant alone is responsible": *Stone v. Hill*, 45 Conn. 47. For a complete review of all the cases in this country upon the general subject of the master's liability or nonliability for the acts of his servant in cases of tort, see the note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 67, 71, 85.

The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the

act which the servant did, which caused the injury, was an act which was expressly, or by necessary implication, within the line of his duty under his employment.

When the plaintiff rested, the proof, as I think, left no room for doubt that the act of the servant was neither within the express nor implied duty imposed upon him by the fact or nature of his employment. The plaintiff was bound by the evidence of Anderson, Aspen and Ross, offered by him, which established the fact that the servant of the defendant was not at the time of the shooting doing an act which was necessary or which he could possibly have believed to be necessary to protect his master's property, but was engaged in a willful and wanton trespass outside the line of his duty.

Anderson testified that he fired the shot "to know for himself" why the men were on the wharf at that hour of the night. He was not employed for that. It was not in the line of his duty to shoot at men to learn that fact. It is quite apparent, of course, that the shooting in this case could in no sense be considered a negligent act. It was clearly willful. It was an act of the servant intentionally done. It was as wrongful as it was willful. It can hardly be characterized as less than malicious. It was evidently inspired by a feeling of personal resentment to punish the three men, because he thought they were the persons who had threatened to kill him on the afternoon of the same day.

Under the early English authorities, beginning with Lord Kenyon's judgment in *McManus v. Crickett*, 1 East, 106, for such an act as that done by this defendant's servant the ³³⁰ master was not liable. The early cases made the test of the master's liability depend upon the moral quality of the act, instead of leaving it to depend upon the question of whether the act was done in the line of the master's business and within the scope of the servant's employment. This was not only true in England, but in this country: *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Wright v. Wilcox*, 32 Am. Dec. 507, note; *Cox v. Keahey*, 36 Ala. 340, 76 Am. Dec. 325; *Hughes v. New York etc. R. R. Co.*, 36 N. Y. Sup. Ct. 222; *Yerger v. Warren*, 31 Pa. St. 319; *Passenger Ry. Co. v. Donohue*, 70 Pa. St. 119; *Crocker v. New London R. R. Co.*, 24 Conn. 249; *Brasher v. Kennedy*, 10 B. Mon. 30; *Harriss v. Mabry*, 23 N. C. (1 Ired.) 240.

It will not be necessary to cite the cases which show that this rule is no longer followed in England or this country. Any

text-book on "Master and Servant" will give them, and show the gradual growth away from the doctrine of *McManus v. Crickett*; but a careful study of the cases will demonstrate that the reason for the change in the rule has generally been supported upon principles arising out of the contract character of the relation, between the master and the person injured, under which the willful act has been committed. The rule has been gradually extended, until it may be said that the liability of the master for the willful, wrongful and malicious acts of the servant now extends to every case where the act of the servant is done with a view to the furtherance and discharge of his master's business and within the scope and limits of his employment: *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; 20 Am. & Eng. Ency. of Law, 2d ed., 169.

Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master: *Smith on Master and Servant*, 4th Eng. ed., 299.

The rule, as it is now established by the later judicial declarations, should be held strictly within its defined limits. It ³³¹ is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication.

For a willful act done by a servant not within the line of his employment, and about which there is not a doubtful question of fact as to whether the act of the servant was or was not within the line of his duty, the court should control the case and nonsuit or direct a verdict for the defendant. Whether there be evidence which raises a question to go to the jury as to whether the act of the servant was within the line of his duty and employment is for the court. If the court so determines, then it is a question for the jury whether, under the proof, the act was or was not within the line of the servant's duty or employment.

Where it appears, when the plaintiff rests his case, that the act of the servant was a willful one, and was not, expressly or impliedly, within the line of the servant's duty or employment, there should be a nonsuit.

When the plaintiff rested his case the defendant moved to nonsuit, "because there is no testimony in this case which would, if true, operate to bind the defendant, *P. Sanford Ross, incorporated.*" A careful examination of the plaintiff's proof makes it clear that such was the fact. The shooting by the

servant of the defendant was not, under the proof made by the plaintiff, shown to have been done while the servant was acting within the line of his duty or employment, and a nonsuit should have been granted. Its refusal was error, and for this cause the judgment should be reversed.

The Liability of a Master for the Acts of His Servant is considered in the monographic notes to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93; *Ware v. Barataria Canal Co.*, 35 Am. Dec. 192-201. The rule as to the extent of such liability is, that if the act is done without the authority of the master, and not for the purpose of executing his orders or doing his work, then he is not responsible; but if it is done in the execution of the authority given by the master, and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful: *McCarthy v. Timmons*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Guille v. Campbell*, 200 Pa. St. 119, 49 Atl. 938, 86 Am. St. Rep. 705, and cases cited in the cross-reference note thereto. In *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 357, it is held that where an armed watchman, employed by the owners of a brewery to guard their property and preserve the peace, pursues a person acting on the premises in a drunken and disorderly manner, and, while he is retreating, kills him, the employers are not liable. The decision is placed on the ground that the killing is not done in the line of duty the watchman was employed to perform. But see *Lipscomb v. Houston etc. Ry. Co.*, 95 Tex. 5, 93 Am. St. Rep. 804, 64 S. W. 923.

FIELDERS v. NORTH JERSEY STREET RY. CO.

[68 N. J. L. 343, 53 Atl. 404.]

STREET RAILWAY'S Duty as to Condition of Tracks.—A railway company is bound by the common law, without either a specific statute or ordinance, or a contractual obligation, to lay its tracks in a public street in a proper manner, and to keep them in a proper state of repair. (p. 555.)

STREET RAILWAY—Burden Imposed as Condition to Franchise.—If some burden is imposed by a municipality upon a street railway company as a condition to the grant of its franchise, the acceptance of the condition constitutes a contract between the company and the city. (p. 555.)

NEGLIGENCE—Duty Imposed by Statute or Ordinance.—It is immaterial, in respect to making its violation actionable, whether a duty is imposed by the common law, by a statute, or by an ordinance. (p. 558.)

NEGLIGENCE—Public Duty, Private Action for Breach of.—Where a duty is due to the public, considered as composed of individuals, and is for their protection, each person specially injured is entitled to a private action for his damages. (p. 559.)

MUNICIPAL ORDINANCE—When Citizen has no Action for Breach of.—If the provisions of an ordinance are intended, not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, a breach thereof is remediable only at the instance of the municipality or by enforcement of the penalty prescribed therein, and there is no right of action in an individual citizen especially injured in consequence of the breach. (p. 560.)

STREET RAILWAY'S Liability for Unsafe Street.—An ordinance requiring street railway companies to pave and keep in repair, under the direction of the municipal authorities, the part of the street adjacent to and between their tracks and rails, and providing that if they fail to do so the city may do the work and they shall pay the cost, gives no right of action against a company by a traveler injured through a defective pavement. (p. 563.)

POLICE POWER and Taxing Power Distinguished.—In the case of municipal corporations, the police power extends merely to the regulations of those matters confided by the legislature to the municipality for that purpose, including the power to exact reasonable fees, not for the purpose of revenue, but only incidental to the power of regulation; the power of taxation is exerted to compel citizens and property owners to contribute to the support of the municipal government. (p. 564.)

STREET RAILWAYS—Requiring Them to Pave Street.—For a city to require street railway companies to pave and keep in repair, under the direction of the municipal authorities, the part of the street adjacent to and between their tracks and rails, and to provide that if they fail to do so the city may perform the work and they shall pay the cost, is taxation, and is not supportable as an exercise of the police power. (p. 570.)

Error to the supreme court, whose decision will be found in 67 N. J. L. 76, 50 Atl. 533.

George T. Werts, for the plaintiff in error.

Frederick E. Hodge and Samuel Kalisch, for the defendant in error.

³⁴⁴ **PITNEY, J.** So far as the opinion of the supreme court bases the affirmance of the judgment of the trial court upon the theory that the plaintiff, at the time of her injury, was in the exercise of her rights as a passenger in the act of leaving the defendant's car, it cannot be sustained. Whatever inference might have been drawn from the evidence upon that subject is a matter of no consequence, for no verdict has been rendered against the defendant upon the ground of neglect of any duty that it owed to the plaintiff as a passenger. The trial court charged the jury (apparently with the acquiescence ³⁴⁵ of plaintiff's counsel) that the evidence sufficiently showed that the plaintiff had left the car, and, being in safety upon the highway, was thenceforth a traveler upon the highway, and sub-

ject to all the duties and obligations imposed upon such travelers; and thereupon proceeded to submit the case to the jury solely upon the question whether the defendant had been guilty of a breach of duty owed by it to the plaintiff as a traveler upon the highway. The verdict and judgment, having gone upon this theory, cannot be sustained upon the theory that the defendant's conductor had negligently misdirected the plaintiff about alighting from the car and reaching the sidewalk, or had negligently stopped the car at an unsafe and improper place. The defect in the pavement, therefore, instead of being a mere circumstance to be viewed with other circumstances as bearing upon the question of negligence in stopping the car, or negligence in directing the plaintiff toward her destination, becomes the essential fact upon which alone the negligence of the defendant company is to be predicated. And if the judgment can be sustained, it must be upon the ground that the plaintiff has an action against the defendant for personal injury occasioned by the nonrepair of the street pavement while she was a foot-passenger upon the street, and irrespective of the consideration that she had ridden upon the defendant's car.

The defect in question was a deep hole in the street pavement between the rails of the track, and according to the plaintiff's evidence this was the immediate occasion of her injury. There was evidence tending to show that the hole was the result either of nonrepair or improper repair of the pavement, and that it had existed for a sufficiently long time to put the defendant upon notice, if the defendant was bound in law to take notice of the condition of the pavement. Of course if the defendant was under an absolute duty to repair the pavement, it was at the time under a duty to observe its condition. Therefore, in all aspects the case was one proper for the jury's consideration, if there existed a legal obligation upon the defendant to repair the pavement.

There is nothing in the case to show that the pavement in ³⁴⁶ question had been laid or maintained by the defendant or that the defect resulted from any act of commission on the defendant's part. Nor is there anything to connect the defect with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance or operation of the railway produced the defect. The location of the hole between the rails is a mere circumstance without causative significance. And the only default attributable to the defendant is the failure to repair.

It is familiar law that a railway company, having the right to lay tracks in a public street, is bound by the general principles of the common law, and without either a specific statute or ordinance, or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair: 2 Thompson on Negligence, 2d ed., sec. 1353. But the question of the liability of such a company for failing to keep the surface of the street in repair is quite a different question. Such a liability does not result from the mere fact that the corporation has been vested with a franchise or license of using the public street. The liability to maintain the pavement as such, if it exists, must either be rested upon some valid statute or ordinance imposing such a duty, or must arise out of the obligations of a contract. It has been repeatedly held that where some burden is lawfully imposed by a municipality upon a street railway company as a condition of the grant of its franchise, the acceptance of such a condition by the company constitutes a contract between the company and the municipality: *Wilbur v. Trenton Passenger Ry. Co.*, 57 N. J. L. 212, 31 Atl. 238; *Cape May etc. R. R. Co. v. City of Cape May*, 58 N. J. L. 565, 34 Atl. 397; *City of Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80, 44 Atl. 948; *Dean v. City of Patterson*, 67 N. J. L. 199, 50 Atl. 620. Were an ordinance of such a character invoked in the present case the question would remain whether the plaintiff, having no privity therein, could sue for a breach of its provisions. In *Appleby v. State*, 43 N. J. L. 165, Mr. Justice Depue, speaking for this court, said: "A duty, the breach of which is an actionable wrong, may arise from a contract, or be imposed by positive law, independent of contract. In the first case the party to the contract only can sue; in the ³⁴⁷ other case any person injured may sue if he be one of the class of persons for whose benefit the duty is imposed." The rule here recognized was enforced by the supreme court in *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Styles v. F. R. Long Co.*, 67 N. J. L. 413, 51 Atl. 710.

But the present case is devoid of evidence to show that any liability for the repair or maintenance of the street pavement was imposed upon the defendant as a condition of its right to exercise its franchise, or that the defendant, by any contract, has undertaken such a duty. The plaintiff introduced in evidence an ordinance adopted by the board of street and water commissioners of the city of Newark September 6, 1894, purporting to apply to all street railways and imposing upon

the operating companies the duty of paving, repaving and repairing the space between the rails. Its terms will be set forth more fully below. Defendant's duty to repair was rested upon that ordinance alone. The trial court, and also the supreme court, treated it as a valid police regulation, imposing an absolute duty upon the defendant for the general benefit of the traveling public, so that an action would lie at the instance of any traveler injured through a neglect of imposed duty to repair the pavement. The bills of exceptions clearly raise the question whether a duty of repair was lawfully imposed upon the defendant by the ordinance in question, and whether the plaintiff, as a traveler upon the highway, was one of the class for whose benefit that duty was imposed.

It is certainly well settled that a specific duty, the violation of which is actionable, may arise from a valid statute or municipal ordinance, as well as from the general principles of the common law. Familiar examples among our statutes are the so-called "law of the road" (Gen. Stats., p. 2823, sec. 91), and the requirement that a railroad locomotive shall sound a bell or whistle on approaching a highway crossing: Gen. Stats., p. 2645, sec. 29. The books contain many cases arising out of breaches of the latter duty. The duty imposed upon railroad companies "to use all practicable means to prevent the communication of fire from any locomotive engine," and making them liable in damages to the person ³⁴⁸ injured, is an instance: Gen. Stats., p. 2670, secs. 13, 14; Delaware etc. R. R. Co. v. Salmon, 39 N. J. L. 299, 303, 23 Am. Rep. 214. So is the duty to provide spark-arresters: Gen. Stats., p. 2671, secs. 15, 16; Wiley v. West Jersey R. R. Co., 44 N. J. L. 247; Hoff v. West Jersey R. R. Co., 45 N. J. L. 201; West Jersey R. R. Co. v. Abbott, 60 N. J. L. 150, 37 Atl. 1104. So, doubtless, are such of the provisions of the act relating to factories, etc. (Pamphlet Laws of 1885, p. 212; Gen. Stats., p. 2345), as are expressly designed for the personal safety of the operatives. Other instances might be cited.

Nor does there seem to be any distinction between a valid statute and a valid ordinance, in respect to the binding force of a duty created thereby. A lawful municipal ordinance is an exercise of the delegated power of legislation, and is the law of the place. When adopted in the exercise of that power which is commonly called the "police power," ordinances frequently prescribe for persons subject thereto a rule of conduct, for the purpose of insuring the safety of others. Familiar

instances of municipal ordinances imposing duties, for a breach of which an action may be maintained by any person specially injured, are those regulating the speed of vehicles in streets, those requiring railroad companies to place gates or flagmen at street crossings, those regulating excavations in the streets, the use of explosives and the like. In *New Jersey Express Co. v. Nichols*, 32 N. J. L. 166, 169, 33 N. J. L. 434, 441, 97 Am. Dec. 722, the plaintiff was attempting to pass along a sidewalk in the city of Newark when he was caught and injured by the wagon of the defendant being backed up to the side of the building adjoining the walk for the purpose of taking in packages from the building. The fact that the wagon was thus backed, in violation of a city ordinance, was a circumstance considered as material by the supreme court and by this court upon the question of defendant's negligence. In *New Jersey R. R. Co. ads. West*, 32 N. J. L. 91, *New Jersey R. R. Co. etc. v. West*, 33 N. J. L. 430, the plaintiff was watching a railroad train approaching a street crossing from one direction, at a rate exceeding that limited by the city ordinance, and was struck by a train coming from the opposite direction at a less speed. The ordinance ³⁴⁹ required no flagman at this crossing, and the defendant company relied upon the ordinance, and claimed to have complied with it. This court treated the fact that the fast train was exceeding the limit fixed by the city ordinance as a circumstance tending to show negligence on the part of the defendant, and to rebut the allegation that there was contributory negligence on the part of the plaintiff.

In some jurisdictions contention has arisen as to whether the violation of a statute or ordinance intended to regulate the conduct of the individual constitutes negligence per se, or conclusive evidence of negligence; or whether, on the other hand, such violation is only prima facie evidence of negligence. Abundant citation of authorities will be found in 21 American and English Encyclopedia of Law, second edition, title "Negligence," 460, 478, 483; *Thompson on Negligence*, second edition, sections 10, 773, 1094, 1196, 1226, 1394, 1396, 1528, 1538, 1554, 1900, 1905, 2103.

Perhaps the doubts have arisen from confusing the action for violation of a specially imposed duty with the action for violation of the common-law duty of exercising care under given circumstances. It would seem that a correct definition of actionable negligence must include the notion that a legal

duty has been violated; whether the duty arose from the common law or from a valid statute or municipal ordinance would seem immaterial: See Thompson on Negligence, 2d ed., secs. 1, 12. Assuming the party injured in a given case to be one of a class for whose benefit a duty has been by statute or ordinance imposed upon the opposite party, and assuming that the evidence shows an actual breach of that duty, it would seem the sole remaining inquiries should be whether the violation of the imposed duty was the proximate cause of the injury, and if so, whether any faulty conduct of the injured party was a contributing cause. This view of the matter would give to the party aggrieved by a violation of a duty that had been imposed for his benefit the right to maintain an action for an injury thereby sustained, irrespective of the question whether the conduct complained of could be properly termed negligent in the general sense. This is the case with those statutory actions that stand quite apart from negligent conduct; such, for instance, as the ³⁵⁰ action for damages for excessive distress under the statute of Marlbridge (52 Henry III), embodied in our act concerning distresses as section 1 (Gen. Stats., p. 1207), and the special action for a mere irregularity in the proceedings consequent upon a lawful distress for rent, which action was conferred by the statute 2 George II, chapter 19, section 19, whose provisions are found in section 12 of our act concerning distresses.

Without pursuing the subject further, we assume, for the purposes of the following discussion, that there is no distinction between a common-law duty and one imposed by statute or ordinance, with respect to entitling a party injured to his damages, and no distinction between a valid statute and a valid ordinance with respect to its effect in imposing a duty for violation of which an action will lie.

But the action for breach of a duty, however the duty be created, is only for the benefit of the party aggrieved. We are at once confronted with the inquiry, "To whom is the duty owing; for whose benefit was it created?" Hence arises a rational distinction that seems to have been recognized from the earliest times. Thus in Comyn's Digest, title "Action upon Statute" (F), it is laid down that "in every case where the statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute," etc. See, also, Cooley on Torts, 650, 658.

A leading English case is *Couch v. Steel* (1854), 3 El. & B. 402, 23 L. J. Q. B. 121. There was a statute which enacted that every ship on a foreign voyage should be supplied with certain medicines, and the action was brought against the ship owner by a seaman, alleging a breach of this duty and consequent loss of health to the plaintiff. Lord Chief Justice Campbell said: "The enactment provides a benefit for the seaman; and thereby the plaintiff, being a seaman on board, was deprived of that benefit, and his health was injured." Accordingly the action was sustained. This decision was not distinctly overruled, but the generality of Lord Campbell's reasoning was criticised by the court of appeal in *Atkinson v. Newcastle etc. Waterworks Co.* (1877), L. R. 2 Ex. Div. 441, 46 L. J. Ex. 775. The water company failed in ³⁵¹ its statutory duty to maintain fire-plugs with pipes filled with water at a certain pressure. The court held that a property owner, whose buildings had been burned in consequence of the water company failing in this duty, had no action against the company. These cases are cited by Mr. Justice Dixon in *Weller v. McCormick*, 52 N. J. L. 472, 19 Atl. 1101, as authority for the discriminating statement of the rule to which he there gives expression, viz.: "For it is a general principle that where there rests upon any person a public duty, either arising at common law or created by statute, and that duty is due to the public, considered as composed of individuals, and for their protection, each person specially injured by breach of the obligation is entitled to a private action to recover compensation for his damage."

And the same distinction is recognized in the language already quoted from *Appleby v. State*, 45 N. J. L. 165.

The decision in *Sonn v. Erie R. R. Co.*, 66 N. J. L. 428, 49 Atl. 458, affirmed in this court for the reasons given in the court below (67 N. J. L. 350, 51 Atl. 1109), recognizes that distinction. There the railroad company was required by the charter under which its road was constructed and operated (Pamphlet Laws of 1867, p. 301, sec. 9), "to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby." Here was a positive unconditional duty imposed for the express benefit of the traveling public, and although the same section provided that if the company neglected to perform the duty, the public officers having charge of the repairs or maintenance of the road, and

having unsuccessfully warned the company, might proceed to do the work and recover the cost from the company, it was held by the supreme court that the plaintiff was one of the class of persons for whose benefit the duty was imposed, and might sustain an action for damages arising from its breach. In the argument of the case in this court the construction adopted by the supreme court was not in this respect questioned.

³⁵² In examining a municipal ordinance in the effort to determine its scope and purview, an important and sometimes controlling inquiry is, whether it was passed in the exercise of the police powers of the municipality for the regulation of the conduct of persons within the corporate limits, in order to conserve the safety of persons or property, or whether it is an exercise of the taxing power of some other governmental power. We find running through the adjudicated cases a rule of construction almost universally adopted, that where the provisions of an ordinance are intended, not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remediable only at the instance of the municipal government or by the enforcement of the penalty prescribed therein; and that there shall be no right of action to an individual citizen especially injured in consequence of such breach. The most conspicuous cases of this sort are those that deny liability to private suit for violation of the duty imposed by ordinance upon abutting property owners to maintain sidewalk pavements or to remove ice and snow from the walks: *Moore v. Gadsden*, 93 N. Y. 12; *City of Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, 25 N. E. 937; *Kirby v. Boylston Market Assn.*, 14 Gray, 249, 74 Am. Dec. 682; *City of Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Taylor v. Lake Shore R. R. Co.*, 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728.

Two reported decisions in our circuit courts indicate the general acceptance of this distinction in this state—*Snowden v. Dodd*, 8 N. J. L. J. 296 (Essex Circuit, 1885, Depue, J.); *Courtney v. Central R. R. Co.*, 18 N. J. L. 173 (Union Circuit, 1895, Van Syckel, J.).

That the New York and Massachusetts cases just referred to proceed upon the distinction now asserted, and not in denial of

the binding effect of ordinances in general, is evidenced by the fact that in those same states the liability to private suit for violation of ordinances passed in the exercise ³⁵³ of the police power is fully recognized: *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, 11 Am. St. Rep. 617, 21 N. E. 101; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Wright v. Malden etc. R. R. Co.*, 4 Allen, 283; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Hall v. Ripley*, 119 Mass. 135.

Turning now to the ordinance sub judice, upon which alone the defendant's liability is rested, we find it is entitled "An ordinance regulating street railways and providing for paving and repairing in the street through which street railways are built or operated." It consists of eight sections.

Section 1 provides that when the tracks of any street railway have been or shall be laid in any street in the city which at the time of laying the tracks shall be unpaved, it shall be the duty of the railway company laying the track or operating the railway to pave between the rails of the tracks, and between the tracks, and for the space of one foot outside of each outer track, with such pavements and in such manner as the board of street and water commissioners shall determine, and said pavements so laid shall by said company or its successors be kept in good and complete repair to the satisfaction of the board of street and water commissioners, or if not so kept and maintained the repairs thereto may be made by the board, and the cost thereof shall be paid on demand by the railway company to the board, provided the board shall give at least ten days' notice to the company of its intention to make such repairs.

Section 2: That where the tracks of any street railway company have been or shall be laid in any paved street it shall be the duty of the company laying the tracks or operating the railway to repave between the rails of the track and between the tracks, and for the space of one foot outside of each outer track, and to such further distance as may be necessary to bring the whole pavement of the street into proper conformity, the pavement to be of the same character and equal in quality to the pavement with which the remaining portion of the street is paved. Such pavement to be laid under the direction of the board, and to its satisfaction, and to be thereafter ³⁵⁴ kept in repair by the company or its successors to the satisfaction of the board; or if not so kept and maintained, the repairs thereto may be made by the board, and the cost thereof shall be paid,

on demand, by the company to the board, provided the board shall give at least ten days' notice, in writing, to the company of its intention to make such repairs.

Section 3: That where the board shall cause any street to be paved or repaved, it shall be the duty of the railway company owning or operating a street railway in such street, at the same time to pave or repave between its tracks, and for the space of one foot on the outside of each outer track, with such pavement and in such manner as the remaining portion of the street is paved or repaved by the board; the pavement to be laid and relaid under the direction of the board, and to its satisfaction; and the pavement so laid to be thereafter kept by the company in repair to the satisfaction of the board, or if not so kept and maintained, the repairs thereto may be made by the board and the cost thereof shall be paid on demand of the railway company to the board, provided the board shall give at least ten days' notice, in writing, to the company of its intention to make such repairs.

Section 4: That where the tracks of any street railway company, or any portion thereof, shall be taken up by the company for any reason, or the pavement under the charge of the company shall in any way be disturbed, it shall be the duty of the company to at once relay the pavement so disturbed or taken up, not only to the full width to which it has been so disturbed, but to such further distance as may be necessary to again bring the whole pavement of the street into proper conformity, said work to be done under the direction of the board, and to its satisfaction.

Section 5: That it shall be the duty of every street railway company owning or operating a street railway to keep in thorough repair, to the satisfaction of the board, the crosswalks crossing the railway, and for one foot outside of the outer track of the railway, said crosswalks to be in every way equal in quality to the remaining crosswalks, and all new crosswalks ³⁵⁵ laid by the company to consist of stone not less than four feet in width and reaching between the tracks.

Section 6: That no company owning or operating any street railway shall take up any pavement or crosswalk, except for the purpose of repair, without the consent of the board or of the superintendent of works, and no street railway shall alter or change the grade of its tracks without the consent of the board.

Section 7: That in case any street railway company shall fail to pave any portion of its tracks pursuant to the terms of this.

ordinance, to the satisfaction of the board, the board, upon ten days' notice to the company, may cause the pavement to be laid or taken up, and the said portion of the street to be paved or repaved, to the satisfaction of the board, and the company shall, upon demand, pay to the board the cost thereof.

Section 8: That the board reserves to itself the right to appoint inspectors to supervise any paving or repaving to be done by any street railway company pursuant to the terms of this ordinance, and the cost of such inspectors shall be refunded and paid to the board by the company on demand; and all permits to lay down street railway tracks or to locate street railways, or to open the streets for the relaying of tracks shall be expressly subject to all the terms of this ordinance.

Assuming the validity of the ordinance, it seems to us not to admit of the construction that it was designed for the safety of travelers upon the street as a class. On the contrary, the design is to impose upon the street railway company a share of the public burdens of the municipal government. The prime object is the relief of the municipal treasury; the duties imposed are to be performed by the company as one of the municipal agencies and under the immediate supervision of a municipal board, and the ordinance provides that, for any omission by the company to comply with its terms, the remedy shall be applied by the board itself, in proceeding to do the work and recovering the costs thereof from the company. There is no penalty imposed upon the company; there ³⁵⁶ is nothing to indicate that it is done for the safety or protection of travelers upon the street; there is nothing in the language to indicate that it was the intent of the municipal authority, in passing the ordinance, that it should give rise to an action against the company by any citizen aggrieved through a breach of its provisions. There is no discretion given to the company as to the mode or style of paving or repairs; on the contrary, it is within the fair intendment of the ordinance that all work which is required to be done by the street railway company shall be done under the immediate direction of the board of street and water commissioners, or its inspectors and supervisors.

But if there be any doubt about our construction of this ordinance, there remains the question of its validity.

In the opinion of the supreme court it is said that the ordinance was passed under due legislative authority for the regulation of all street railways; that it is a police regulation, in which the traveling public are concerned, and that the burden

thus laid upon the operating companies is one fairly within proper police regulation, and could constitutionally be imposed as a condition of the exercise of a franchise in a public street, whether under an irrevocable contract or otherwise.

This statement, it will be perceived, recognizes the importance of seeking out the source of power, as having a bearing upon the validity of the ordinance, as well as upon its proper construction if valid.

By way of legislative authority we are referred to Pamphlet Laws of 1857, page 116, and Pamphlet Laws of 1891, page 249, section 12. No other legislation was referred to in the argument before us. The enactment of 1857 is the revised charter of the city of Newark, by which a common council was established, with power to make ordinances to regulate and keep in repair the streets, to license and regulate vehicles and carriages used for the transportation of passengers and merchandise, to grade and pave the sidewalks, etc. The act of 1891 had the effect of establishing a board of street and water commissioners, who became vested with the powers formerly vested in the common council, including the general control over the streets, and ³⁵⁷ with the express power to pass ordinances to regulate and control the use of streets and public places by foot-passengers, vehicles, railways and engines, and to grant franchises and locations to street railway companies for the operation of railways; subject, however, to the limitations contained in the general laws of the state relative thereto. The constitutionality of this statute has been sustained by the supreme court: In re Haynes, 54 N. J. L. 6, 22 Atl. 923.

The powers to which we are thus referred are properly classed among the police powers of the municipality.

The distinction between the police power and the taxing power is entirely clear. The former extends merely to the regulation of those matters that are confided by the legislature to the municipal corporation for that purpose, including the power to exact reasonable fees, not for the purpose of revenue, but only as incidental to the power of regulation. The power of taxation is exerted in order to compel citizens and property owners to contribute to the support of the municipal government: Tiedeman on Municipal Corporations, secs. 116, 123, 124, 253; Dillon on Municipal Corporations, 4th ed., secs. 141, 357-360, 768. The power to regulate the use of the public streets, including limitations upon the speed of travel, the exclusion of vehicles from the sidewalks, the regulation of public conveyances, and the

like, are instances of the exercise of the police power: Dillon on Municipal Corporations, sec. 393.

Nowhere, it is believed, has the distinction between the police power and the taxing power been kept more clearly in view than in New Jersey. Our courts, while giving full scope and reasonable construction to the powers delegated by the legislature to the municipalities, have been careful to check any usurpation of the taxing power attempted under the guise of police regulation. A conspicuous example is to be found in the decision of the supreme court in *North Hudson County Ry. Co. v. Hoboken*, 41 N. J. L. 71. As this decision is cited in the opinion now under review as authority for the proposition that an ordinance requiring a street railway company to pave the street and maintain the pavement is fairly within proper police regulation, and as it has been elsewhere cited to the same effect (*Booth on Street Railway Laws*, sec. 243, ³⁵⁸ note; *Cape May etc. R. R. Co. v. City of Cape May*, 59 N. J. L. 401, 36 Atl. 698), it deserves more than a passing mention.

The report of the case shows that after the railway company had constructed, under legislative sanction, certain lines of street railway, operated with horses, the municipal council adopted certain ordinances, general in their effect, which, among numerous other provisions, required all street railway companies to take out licenses for the running of their cars, and thereupon to pay into the city treasury annual license fees of fifteen dollars for each one-horse car and twenty-five dollars for each two-horse car, at the same time imposing a penalty for each time any car should be run without a license. These ordinances were brought under review by writ of certiorari. The report shows that the argument of the counsel of the prosecutor was directed to the validity of those parts of the ordinances that required the taking out of licenses and the payment of license fees. The opinion of the supreme court was delivered by Mr. Justice Depue (afterward chief justice), who, near the outset of the discussion, used this language: "A municipal corporation, under the ordinary powers of local government, in virtue of its control over its streets, may adopt reasonable regulations for the government of the city, for the preservation and safety of its streets, and for the maintenance of good order. The provisions in these ordinances, requiring the tracks to conform to grade, and to be laid under the direction of the street commissioner, for keeping in repair the space between the rails, requiring bells to give warning of the approach of the cars, providing for the removal

of snow, and the like, are of the character of regulations which may be adopted, and, if reasonable, are valid. Such regulations do not appreciably interfere with the exercise of its franchise by a corporation having the franchise to use the public streets for its business; they are necessary for the good government of the city, and the legislature is presumed to have intended, when it authorized the use of the public streets for such purposes, that its grantee should hold its privileges subject to such regulations as are reasonably necessary for the common use of the streets for the purposes ³⁵⁹ of a street railway and for ordinary travel. But an ordinance requiring a license as the condition under which a railway company shall be permitted to run its cars, and exacting a license fee therefor, is quite a different thing."

The learned justice then proceeds to show that the function of granting licenses is an incident of the police power of regulation; that the grant of power to license does not carry, by implication, the power to charge license fees for revenue; and that the exaction of license fees for revenue purposes is clearly an exercise of the taxing power, and cannot be sustained unless the charter plainly shows an intent to confer that power. And so the ordinances were set aside so far as they affected the prosecutor by imposing license fees.

If the language quoted from this opinion were intended to mean that the police power justified the imposition upon street railway companies in general of the duty of repairing the streets and of removing snow therefrom, it would be quite incongruous with the point actually decided, and to which much stress of argument was devoted. What the learned justice said, however, was merely that "the provisions in these ordinances" (meaning the ordinances before the court), so far as they applied to certain things that he mentioned, were "of the character" (that is, within the category) of regulations that, if reasonable, would be valid. He did not say that the regulations in question were either reasonable or valid; he did not undertake to say specifically what they were. They do not appear in the report of the case, because they were not the subject of attack, or even of discussion. The opinion shows that he referred to them only casually, as instances of the exercise of the power of regulation, so that he might illustrate by antithesis the character of the licensing clauses that were under criticism. If any greater significance was intended to be given to the language quoted, it was manifestly obiter dictum.

An examination of the ordinances that the learned justice had before him, which may be found among the files of the supreme court, shows the correctness of what has just been said. The original ordinance was approved June 27, 1861,³⁶⁰ and contains ten sections, the first of which enacts, in substance, that when any permission shall hereafter be granted to any person or corporation to lay tracks and run cars over the streets of the city, such person or corporation shall be subject to the following conditions and restrictions: That the tracks shall be laid under the direction of the street commissioner and committee on streets; that the rails shall be laid on the established grades, and shall at all times conform to grades hereafter established; that such person or corporation shall keep in good repair the space between the rails and two feet on each side of the outer rails, etc. Section 2 requires all companies to keep bells upon their horses to give warning of their approach, limits the speed to six miles an hour, requires the cars to be lighted at night, and further provides that, in clearing or removing the snow or ice from the tracks, it shall be done so as not to interrupt public travel or interfere with the rights of abutting property owners, and that no salt or other melting substance shall be used for removing the snow. The remaining sections, so far as they apply to companies already existing, are regulative merely, excepting the one that imposed the annual license fee for each car; and this, by its terms, applies, not only to companies thereafter to be authorized to construct tracks, but also to companies already in operation. The amendatory ordinances relate solely to the system of licensing attempted to be established by the ordinance of 1861.

It will be seen that there was nothing in the ordinances requiring the repair of the streets by companies already established. The declaration was that companies obtaining permission in the future to lay tracks must take it subject to the condition indicated. These were the days of horse railroads, whose operations had the effect of concentrating the wear and tear upon a limited portion of the street; and the proposition was that, as a quid pro quo for a local "franchise," any new horse railroad company should agree, not, indeed, to pave or repave, but to repair the street. It will also be noticed that nothing in the ordinances required the removal of snow; the requirement was that if the company³⁶¹ desired to remove the snow for its own convenience, it should do so in a manner not to interfere with the rights of others.

So much for the Hoboken case. It has been much misunderstood. It is a clear authority against, not in favor of, any construction of the police power that would permit it to be employed for purposes of revenue. That case was followed by the supreme court in *City of Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80, 44 Atl. 948, where it was again held that an ordinance imposing license fees for revenue upon a street railway company could not be supported as an exercise of the police power.

In the following cases the supreme court has sustained municipal regulations imposed upon street railways in the exercise of the police power, viz., an ordinance requiring horse railroad companies to have an agent upon each car, in addition to the driver, to assist in the control and care of the car and its passengers, and to prevent accidents and disturbances of the good order and security of the streets (*Trenton Horse R. R. Co. v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076); an ordinance prohibiting the placing of salt upon street railway tracks, except on curves leading from one street to another (*Traction Co. v. Elizabeth*, 58 N. J. L. 619, 34 Atl. 146); an ordinance limiting the rate of speed of electric cars running in the streets (*Cape May etc. R. R. Co. v. City of Cape May*, 59 N. J. L. 393, 36 Atl. 679); an ordinance requiring the use of fenders on the front of electric cars to prevent accidents (*Cape May etc. R. R. Co. v. City of Cape May*, 59 N. J. L. 396, 36 Atl. 696); an ordinance requiring electric cars to come to a full stop at each street before crossing it (*Cape May etc. R. R. Co. v. City of Cape May*, 59 N. J. L. 404, 36 Atl. 678); an ordinance having the effect of prohibiting a trolley company, already authorized to string electric wires upon poles in the streets, from cutting or trimming any trees in so doing without first obtaining permission from the governing body: *Consolidated Traction Co. v. East Orange*, 61 N. J. L. 202, 38 Atl. 803. No criticism is now made upon any of these decisions. They give no support to the present ordinance.

This court, as it happens, has not been called upon to deal directly with the question of municipal regulation of street ³⁶² railroads. But the power of the municipality to regulate the crossings of streets by steam railroads has been more than once brought here for consideration. In *Pennsylvania R. R. Co. v. Jersey City*, 47 N. J. L. 286, it was held that an ordinance prohibiting the obstruction of a crossing for more than three minutes at a time was within the granted powers of

regulation of the streets and of railways; that such regulations must be reasonable; and the ordinance in question being plainly reasonable in its general application to crossings throughout the city, and open to question in this respect only as to three streets near the terminal of one railroad, this court refused to set aside the ordinance in toto, leaving the railroad company to raise the objection of unreasonableness with respect to either of the three crossings in any proceeding that might be taken to enforce the ordinance. In *Morris etc. R. R. Co. v. Orange*, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363, this court held that the police powers of government are sufficient to authorize imposing upon a steam railroad company the duty of protecting the public at grade crossings over city streets by the erection and maintenance of gates and the employment of flagmen; and that therefore, in proceedings taken by the municipality to ascertain damages, allowable for the opening of a street, the railroad company, while entitled to compensation, was not entitled to have the cost of the gates and flagmen included in the allowance.

In many other cases in the supreme court the distinction between the police power and the taxing power has been discussed: *Kip v. City of Patterson*, 26 N. J. L. 298; *State v. Hoboken*, 33 N. J. L. 280; *Delaware etc. R. R. Co. v. East Orange*, 21 N. J. L. 127; *Muhlenbrinck v. Commissioners*, 42 N. J. L. 364, 36 Am. Rep. 518; *Clark v. New Brunswick*, 43 N. J. L. 175; *Morgan v. Orange*, 50 N. J. L. 389, 13 Atl. 240; *Mulcahy v. Newark*, 57 N. J. L. 513, 31 Atl. 226; *Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80, 44 Atl. 948. And two cases in this court may be mentioned: *Haynes v. Cape May*, 52 N. J. L. 180, 19 Atl. 176; *Johnson v. Ashbury Park*, 60 N. J. L. 427, 430, 39 Atl. 693.

It is needless to say that this extended reference to familiar decisions has been made, not for the purpose of showing the existence of a distinction that is so universally recognized, but ³⁶³ for the purpose of showing how rational is the distinction, and how easy of application; and in order to demonstrate how impossible it is that a power conferred by the legislature for the purpose of regulating the streets of a city, and the use of the streets by traction companies and others, can, by any defensible interpretation be so stretched as to cover an ordinance of the character of that now before us. The traction company is in the enjoyment of a public franchise granted by the legislature; it has a use of the streets differing only in kind from that of other

citizens using them, and has no interest in the soil; it is under a general obligation to keep its rails in repair so they shall not become an obstruction to travel; it is also bound by any contract it may lawfully have made with the municipality in consideration of the grant of its local privileges. But, entirely independent of any such consideration, and irrespective of any disturbance of the street surface in the operation of the railway, this ordinance attempts to impose upon every traction company the duty to pave a considerable portion of every street over which it passes, although it may bring no additional wear and tear upon the pavement; and the further duty to keep such pavement, when laid, at all times in repair. To call this "regulation," or an exercise of the police power, is a misuse of terms. It is taxation, pure and simple. It calls upon the company to perform a function not essentially different in character, although vastly more onerous, than the once familiar operation known as "working out" the township road taxes by the labor of the inhabitants: Gen. Stats., p. 2817, sec. 51, etc. A power that will not support the imposition of license fees fixed on a revenue basis will certainly not support an ordinance of this character.

We therefore hold that the ordinance is not supportable as an exercise of the police power; and since no other legislative authority exists for its enactment, it imposed no duty upon the defendant company to repair the pavement between its rails or to repave that portion of the street.

We have not forgotten the "Act to provide for the incorporation of street railway companies and to regulate the ³⁶⁴ same," approved April 6, 1886: Pamphlet Laws, p. 185; Gen. Stats., p. 3216. Section 18 is as follows: "That every street railway company incorporated under this act shall keep in repair, to the satisfaction of the local authorities, the paving, upper planking or other surface material of the portions of streets, roads and bridges, occupied by its tracks, and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks; provided, that nothing in this section shall be deemed to affect or repeal existing provisions of any municipal charter or any ordinance or regulation heretofore passed or adopted."

There is nothing in this case to show when or under what legislative authority the defendant company was incorporated. Nor was this statute invoked in the argument of the learned counsel for the plaintiff in this court. We cannot assume that

the defendant was incorporated under that act, in view of the existence of other legislation to which its origin may as naturally be attributed. We are therefore relieved from considering whether section 18 of this act creates a liability in favor of any member of the traveling public who may sustain damage through the nonrepair of the street.

The judgment should be reversed, and a venire de novo awarded.

Fort, J., dissented, and with him concurred Justice Hendrickson and Judge Bogert. He was of the opinion that the conclusion reached by the supreme court in 67 N. J. L. 76, 50 Atl. 533, was based upon a proper application of the police power and also upon a wise public policy.

"I agree," he said, "with Mr. Justice Pitney in his opinion in this case wherein he declares that 'the plaintiff, at the time of her injury, was not in the exercise of her right as a passenger in the act of leaving the defendant's car,' and that, if she can recover, it is only upon the theory that the defendant, by a failure to repair the hole in the highway lying between its tracks, had failed to perform some duty which it owed the plaintiff as one of the public.

"It is misleading, in my view, to refer to this case as one in which the failure of the defendant is a failure to repair the surface of the street. The hole in the highway was at a street crossing and abutting upon the rail of the track or its foundation, and the failure to repair at this point was a failure to repair its tracks, within the well-recognized principles of law applicable to the duty to repair tracks laid upon a railroad company having a right to lay tracks in the public streets. The majority opinion in this case concedes that 'it is familiar law that a railway company, having the right to lay tracks in a public street, is bound by the general principles of the common law, and, without either a specific statute or ordinance, or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair.' This principle thus stated is clearly sustained by 2 Thompson on Negligence, second edition, section 358, cited in that opinion.

"I am at a loss to perceive how the duty to repair the hole between the tracks was not one of the duties to repair the track, which was incumbent upon the defendant company, under its implied obligation to so construct and maintain the rails of its track as that they should be free from danger to persons lawfully using the highway. I regard the tracks as contemplating all between the rails as laid in the public highway.

"The defendant's counsel, at the hearing and in his brief, admitted that if the defendant company did not have actual knowledge of the condition of its tracks at the point in question, it was

chargeable with such knowledge, because of the length of time the track had been in the condition it was at the time the plaintiff was injured, and applying the principle of law, stated in the majority opinion, to the facts in this case, that 'if the defendant was under an absolute duty to repair the pavement, it was, at the same time, under a duty to observe its condition,' it seems impossible to escape the conclusion arrived at by the supreme court.

"It is held by the supreme court, and not controverted by the majority opinion in this court, that the ordinance of the city of Newark, in evidence in this case, and upon which the plaintiff, in part, relied, requires the repairing by the defendant company between its tracks, and that the charter of the city of Newark, passed in 1836 and cited in the opinion of the supreme court, under the authority of which said ordinance was adopted, was in force at the time the defendant company took over the street railway which had its tracks upon Mulberry street, in the city of Newark, and also at the time of the incorporation of the defendant company. Where a street railway company takes a franchise from a municipality to operate a street railway within the limits of such municipality, it takes it subject to the power of such municipality to regulate, under such franchise, its use of the streets and its duty to pave and repair between the tracks as, expressly or impliedly, authorized by the municipal charter.

"I am also clear, in my view, that such a provision of a city charter or of an ordinance passed under it, is not for the benefit of the city, per se, but is for the protection of the traveling public. Especially must this be true with regard to a provision with relation to the paving and repairing of that portion of the highway lying between the rails constituting the tracks of the company. The city does not pave for its own purposes, per se. Paving is for the use of the public. Both those of the public who pass over it with horses and carriages and those who pass on foot. A corporate entity does not travel and does not need paved streets.

"In *Sonn v. Erie R. R. Co.*, 66 N. J. L. 428, 49 Atl. 458, this court held that a provision of the charter of the Erie Railway Company, which required it to keep its crossings at public highways secure for travel, laid upon it a duty to the public, and for default in so doing it was liable in damages to a person injured because of its neglect of this duty. The principle of that case obtains where any duty is imposed by statute, or an ordinance lawfully passed under statutory authority, and it matters not whether the duty is in a special charter, a general act or a lawful ordinance.

"In the majority opinion there is a discussion of the question as to whether the ordinance of the city of Newark, which attempts to impose a duty upon the defendant company to pave its tracks, is not void because such an imposition is in effect taxation. I shall not

discuss that question further than to express dissent from that view, for the reason that that question is not, in my judgment, in this case for decision."

Vredenburg, J., also dissented and said: "I concur in the dissenting opinion of Mr. Justice Fort in this case as a whole, but desire to especially emphasize my adherence to the doctrine therein contained wherein it is said that 'a city charter or an ordinance passed under it is not for the benefit of the city, per se, but is for the protection of the traveling public. Especially must this be true with regard to a provision with relation to the paving and repaving of that portion of the highway lying between the rails constituting the tracks of the company. The city does not pave for its own purposes, per se. Paving is for the use of the public.'"

The Liability of a Street Railway for failing to keep in repair those parts of the street occupied by its tracks is considered in the note to *Western Paving etc. Co. v. Citizens' St. Ry. Co.*, 25 Am. St. Rep. 480-482; *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 South. 122.

The Right of a Citizen to Maintain an Action for the negligent breach of a public duty resulting in special injury to him is considered in *Ober v. Crescent R. R. Co.*, 44 La. Ann. 1059, 32 Am. St. Rep. 366, 18 South. 818; *Bush v. Artesian etc. Water Co.*, 4 Idaho, 618, 95 Am. St. Rep. 161, 43 Pac. 69.

Under the Police Power, as a part of its regulative policy, a small fee may be imposed, but it cannot be resorted to as a taxing power. And whenever a court can see that the purpose of a regulation is primarily revenue, it will be referred to the taxing power and measured accordingly: *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362.

PASSMAN v. WEST JERSEY AND SEASHORE RAILROAD COMPANY.

[68 N. J. L. 719, 54 Atl. 809.]

RAILROAD CROSSING.—The Cutting of a Train on a Side-track so that some cars are on one side and some on the other of the highway is not an invitation to the public to cross the other tracks without exercising reasonable care. (p. 575.)

RAILROAD CROSSING.—The Absence of Statutory Signals, required to be given of the approach of trains, does not justify a traveler in assuming that it is safe for him to cross a railway track. (p. 575.)

RAILROAD CROSSING.—One About to Cross a Railroad track on a highway is presumed to know the danger, and, while he may reasonably expect to be warned by the prescribed signals of an approaching train, he cannot justify himself in risking the danger,

unless he has exercised his senses in the manner of an ordinarily prudent person. (p. 576.)

RAILROAD CROSSING.—The Law Exacts of a Bicyclist, on approaching a railroad crossing where the view is in anyway obstructed, practically the same reasonable care as it does of a pedestrian. He should dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross. (p. 576.)

John W. Westcott, for the plaintiff in error.

Joseph H. Gaskill and Nelson B. Gaskill, for the defendant in error.

710 VOORHEES, J. It is necessary in the decision of this case to consider only the assignment of error directed to the instruction of the court to the jury to find a verdict for the defendant.

The action was brought by the administratrix of William Passman to recover damages for his death, which was caused by one of the engines of the defendant company colliding with him as he was attempting to cross its tracks on Ohio avenue, in Atlantic City, on a bicycle.

720 The testimony developed the fact that the deceased had for several months prior to the accident been employed by a lumber dealer, whose office was less than one hundred feet from the crossing, and that in the ordinary business of his employment, and in going to and coming from his home, which was in the southern part of the city, on the opposite side of the track from the place of his employment, he necessarily passed over this crossing several times a day and was presumably acquainted with the times and manner of running trains thereover. The railroad and Ohio avenue cross each other at this point at nearly a right angle, the avenue extending north and south and the railroad east and west. At the time of the accident the railroad had four tracks across the avenue; the two nearest the deceased's place of employment were sidings or tracks used for the shifting and storing of cars; the two farthest were the regular express or incoming and outgoing tracks. Just prior to the accident a train of empty cars had been drilled upon the siding tracks, and it was in evidence, although denied by some of the witnesses, that this train had been cut, leaving some cars to the east and some to the west of the avenue, thus permitting passage over the avenue for vehicles and pedestrians. A witness who was walking on the avenue in a southerly direction toward the crossing saw the deceased just before the acci-

dent standing with his bicycle at the door of the office where he was employed, talking with some one. This witness proceeded on his way toward the crossing, and when between the empty cars, or on approaching the lower track, seeing the regular evening express of the defendant company coming at a high rate of speed on the southerly or incoming track, turned and shouted to the deceased to warn him of the danger, and then tried to "grab" him, and, if possible, prevent by force his proceeding in front of the train. In this he was unsuccessful. He says the deceased was almost upon him when he turned; was riding on his bicycle at a moderate rate of speed and going directly in front of the train by which he was struck and instantly killed.

It was contended by the counsel of the plaintiff that the empty cars left on the sidetracks obstructed the view of the ⁷²¹ incoming train; that the cutting of this train of empty cars was an implied invitation to the public and to the plaintiff's intestate that the tracks could be crossed in safety, and also that none of the statutory signals were given by the defendant of the approach of its train, and therefore it was liable in damages for his death. No negligence, however, on the part of the railroad employes would excuse the plaintiff's intestate from exercising reasonable and ordinary care in approaching this crossing, which was a place of obvious and known danger, so that his failure to observe such care would preclude the plaintiff's right of recovery. The cutting of the train was not an invitation to cross without exercising reasonable care; it was only for the purpose of furnishing an opportunity to those who might desire to cross while using the ordinary prudence required by the law under the circumstances apparent from the condition of the crossing. The absence of the statutory signals did not justify the deceased in assuming that it was safe for him to cross. He should have used reasonable care for his own preservation, and, failing therein, he cannot shift the sole responsibility upon the company. If by taking ordinary care he could have avoided the danger, his failure to do so negatives the plaintiff's right of recovery. One cannot recover for the breach of duty of another when he is lacking in ordinary prudence himself.

The respective rights of railroad companies and persons attempting to pass over their tracks at regular crossings are reciprocal. The company has the right of way; it must, however, give the statutory signals of the approach of its trains. A person about to cross a railroad track on a highway is presumed to

know the danger, and, while he may reasonably expect to be warned by the prescribed signals of an approaching train, he cannot justify himself in risking the danger unless he has exercised the senses nature has given to protect him from harm, and he must exercise such faculties in the manner that an ordinarily prudent person would exercise them under similar circumstances. The greater the difficulty of discovering the danger as apparent from the surroundings, the greater is the care required, and if the circumstances are such that ⁷²² one sense is rendered less reliable, the others must be used to a correspondingly greater extent.

As early as 1854, in *Moore v. Central R. R. Co.*, 24 N. J. L. 268, Mr. Justice Potts, in speaking for the supreme court, said: "I am certainly of opinion that the plaintiff was bound to show that he used all ordinary care, all reasonable caution to avoid the collision." This was a crossing case. The plaintiff was seriously injured. On the trial he did not prove any negligence on the part of the defendant or the exercise of ordinary prudence on his own part. This case was before the supreme court on a rule to show cause, and was afterward affirmed by this court on a writ of error in 24 N. J. L. 824, wherein Mr. Justice Haines said the court intended to adopt the principle laid down by the supreme court. Negligence is a fault and will not be presumed against either litigant in the absence of proof: *Pennsylvania R. R. Co. v. Middleton*, 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616. The proper caution to be exercised before attempting to pass over a railroad crossing has been clearly defined in this state by a large number of decisions; a few only are cited here: *Morris etc. R. R. Co. ads. Haslan*, 33 N. J. L. 147; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. L. 180; *Central R. R. Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695; *Green v. Erie R. R. Co.*, 65 N. J. L. 301, 47 Atl. 418.

The plaintiff's intestate in this case was riding on a bicycle, a vehicle propelled by his own power, over which he had personal control. The general rule to be applied requires a bicyclist, on approaching a railroad crossing where the view of the track is in any way obscured, to dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross, and while his acts may vary in certain details, the law requires of him practically the same reasonable care as is required of a pedestrian: *Robertson v. Pennsylvania R. R. Co.*, 7 Am. & Eng. R. R. Cas., N. S., 605.

The deceased was guilty of contributory negligence. There was no error in the order directing a verdict for the defendant, and the judgment thereon should be affirmed.

One About to Cross a Railroad Track must look and listen, and, if there are any difficulties in the way of his seeing and hearing, must stop. If, by acting in accordance with such duty, he could have discovered the approach of a train, he is guilty of contributory negligence: *Weller v. Chicago etc. R. R. Co.*, 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592, and cases cited in the cross-reference note thereto; *Day v. Boston etc. R. R.*, 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, and cases cited in the cross-reference note thereto; *Kinter v. Pennsylvania R. R. Co.*, 204 Pa. St. 497, 93 Am. St. Rep. 795, 54 Atl. 276. As to his right to assume that signals of approaching trains will be given, see *Weller v. Chicago etc. R. R. Co.*, 164 Mo. 180, 86 Am. St. Rep. 592, 64 S. W. 141; *Cleveland etc. Ry. Co. v. Workman*, 66 Ohio St. 509, 90 Am. St. Rep. 602, 64 N. E. 582; *Day v. Boston etc. R. R.* 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335 and cases cited in the cross-reference note thereto.

A Bicyclist, When Approaching a Railroad Crossing, must dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen in the manner required of a pedestrian: *Robertson v. Pennsylvania R. R. Co.*, 180 Pa. St. 43, 36 Atl. 403, 57 Am. St. Rep. 620, and see authorities cited in the cross-reference note thereto; *McCracken v. Consolidated Traction Co.*, 201 Pa. St. 378, 88 Am. St. Rep. 814, 50 Atl. 830.

Am. St. Rep., Vol. 96—37

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PARK & SONS COMPANY v. NATIONAL WHOLESALE
DRUGGISTS' ASSOCIATION.

[175 N. Y. 1, 67 N. E. 136.]

PLEADING.—A Demurrer Admits the facts alleged, but not the conclusions of law. (p. 581.)

PLEADING—What Allegations of a Complaint may be Regarded as Conclusions of Law.—Where a complaint seeking an injunction alleges specifically the acts of the defendants, and follows this allegation with a statement that the defendants are combining and conspiring to obtain exclusive control of the wholesale and jobbing trade as between manufacturer and retailer, and to regulate and control the methods by which such trade shall be carried on, and to control the price and discounts, this must be regarded as a statement of the conclusions of law which the pleader attributes to the facts he has stated, and hence is not admitted by a demurrer. (p. 581.)

RESTRAINT OF TRADE or Forbidden Monopoly—What is not.—An agreement between wholesale druggists and manufacturers of proprietary or patent medicines, fixing the price at which sales shall be made to such druggists and the prices at which they may sell to their customers, and excluding from the right to purchase such medicines at such prices all wholesale druggists who do not maintain the retail prices so fixed, does not create a forbidden monopoly, and is not unlawful as in restraint of trade, where all persons have a right to make purchases at such prices who agree in their sales to maintain such retail rates. (p. 582.)

RESTRAINT OF TRADE.—The Proprietors of Proprietary or Patent Medicines have the Right to specify the price at which such articles shall be sold, and to require all dealers who purchase of them to maintain the prices specified. (p. 583.)

PLEADING—Threats of Intimidation.—An allegation that at a meeting of the druggists' association a committee on proprietary goods reported that, with a few exceptions, the proprietors of all the prominent proprietary medicines had adopted the contract or rebate plan for the sale of their goods, and that the committee rec-

ommended that continued and untiring opposition be shown to the sale of articles of those proprietors who did not adopt such plan, or withdraw from it, does not show threats or unlawful intimidation on the part of the association. (p. 584.)

BOYCOTTING—What is not.—The refusal of the proprietors of patent or proprietary medicines to sell any of their medicines to a wholesale druggist at the price fixed for sales to other wholesalers, unless he will agree not to resell them except at specified prices, which are the same prices fixed for the sale by all other wholesale druggists, is not a boycott. (p. 585.)

EQUITY—Spying on Business, When will not be Enjoined.—The watching of a wholesale druggist's place of business for the purpose of ascertaining what other druggists furnish him with patent or proprietary medicines, in violation of a contract fixing the terms at which such medicines shall be sold and the prices for which they may afterward be retailed, will not be enjoined. (p. 585.)

Henry T. Fay, for the appellant.

Henry Galbraith Ward and Leo Everett, for the respondents.

5 HAIGHT, J. The question presented for review is as to whether the complaint states facts sufficient to constitute a cause of action.

The relief sought by the plaintiff is an adjudication that the resolutions, agreements, plans and modes for the conducting of the business of the sale of proprietary medicines by the National Wholesale Druggists' Association are illegal and that an injunction issue restraining the members of the association from continuing to make efforts to induce any manufacturer or proprietor of what is known as patent or proprietary medicines from adopting the rebate or contract plan for the sale of their goods or of continuing such plan if they have previously adopted the same.

The complaint is very voluminous and I have not attempted to give even a fair synopsis, for that would necessarily cover many pages, and I have not deemed it necessary, for it appears to me that the rights of the parties must depend upon a few controlling facts which may be briefly stated.

It appears from the allegations of the complaint that the matter in controversy has reference to the sale by manufacturers of those particular medicines or remedies covered by trademarks, copyrights or patents which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same. These medicines are known as "proprietary goods," and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price and adopt such plan for the sale thereof as he, in his

judgment, may determine. At one time the sale of these goods was largely made through traveling sales agents who worked upon commissions and supplied the goods to the consumer or retailer. Later on they were sold largely through the druggists, but many of the manufacturers did not maintain a uniform price. They would supply goods to some of the wholesalers upon more favorable terms than to others, thus permitting large dealers to make a profit while a great number of the smaller druggists found the handling of proprietary goods unprofitable. This resulted in the organization ⁶ of the National Wholesale Druggists' Association, an unincorporated body, which, in 1882 and 1883, represented ninety per cent of the wholesale jobbing trade of the United States. At a meeting of this association a plan was devised and adopted for the conduct of the business of the sale of proprietary goods, which was in the form of a petition addressed to the proprietors asking them to fix a uniform jobbing price for fixed quantities, and also a selling price by the druggists which they were to agree to maintain and that the druggists should be allowed the difference between the jobbing and the selling price as their profit or rebate, which they asked should be not less than ten per cent, the proprietors defraying the expenses of boxing and freight to the nearest transportation station of the buyer. It is alleged that a large number of the proprietors consented to this arrangement and adopted the plan suggested by the wholesale druggists. And this mode of conducting the business appears to have been continued until the December meeting of the association in 1893, at which time a committee, to whom the Detroit plan, so called, had been referred, reported, among other things, the following: "That in order to strengthen and render this plan more effective it is respectfully recommended that proprietors accept orders for full quantities with rebate, discounted only from regular houses recognized as belonging to the number who will faithfully observe the prices and conditions established by the manufacturers." This appears to have been adopted and was acquiesced in by the manufacturers and became the plan under which the business was conducted at the time this action was commenced.

It further appears from the allegations of the complaint that the plaintiff never acquiesced in this plan of conducting the business, but always insisted on its right to sell proprietary goods at such price or prices as it saw fit, in its discretion, and would not be bound by the price established by the manufacturers; that thereupon the manufacturers refused to sell or ship

goods to the plaintiff, and it was compelled to procure goods from other druggists; that the National Wholesale ⁷ Druggists' Association caused the plaintiff's premises to be watched by spies or detectives, and that they made reports to the manufacturers of the druggists who purchased goods of the proprietors and caused them to be delivered at the plaintiff's premises, and that the association also furnished the manufacturers with a list of all of the druggists throughout the United States who were willing to be controlled by the contract plan. The complaint then alleges that the defendants "were combining and conspiring to obtain an exclusive control of the wholesale and jobbing trade, as between the manufacturer and the retailer, in all classes of patent medicines or proprietary goods; and to regulate and control the methods upon which the said trade shall be carried on throughout the entire United States, and to control the prices at which, and the discounts, allowances for freight and the terms of credit upon which the said proprietary goods shall be sold to the various retail druggists throughout the United States; and to destroy and prevent any and all competition between the said wholesale and jobbing druggists in the wholesale and jobbing trade in said proprietary goods, and limit and restrict the business of each of the wholesale and jobbing druggists, or such of them as are in one locality, to certain exclusive territory tributary, or proximate, to each of them respectively."

The demurrer is an admission of the facts alleged, but not of the conclusions of law. The allegations just above quoted, I understand to be conclusions of law drawn from the allegations of fact alleged in the complaint, and are not, therefore, admitted by the demurrer. It therefore becomes necessary to determine whether the plan for the conducting of the business of the sale of proprietary goods, adopted by the association and which it requested the proprietors or manufacturers to adopt and carry out, is lawful. The question thus presented is of considerable importance. The plan, as we have seen, in its substantial features, has been in operation nearly twenty years and in its final completed form nearly ten years. This plan, as I understand, is not one confined to the sale of proprietary medicines, but is one that has been ⁸ adopted by many manufacturers of merchandise and other goods where manufacturers have established a trademark and have gained a reputation which they wish to maintain throughout the country for character, quality and durability of the goods which they manufacture. They have,

consequently, established prices at which their goods shall be sold to the consumer and require all wholesale and retail dealers to supply the consumer at the price list established. The decision, therefore, reached herein may largely affect the plan of conducting business in other articles of commerce.

It is said that the National Wholesale Druggists' Association was organized and continued for the purpose of monopolizing and controlling the business of the wholesale druggists and jobbers in the sale of proprietary or patent medicines in the United States. The association, doubtless, was organized and continued for the purpose of devising and procuring to be carried into effect a plan for the sale of such goods throughout the United States, which would do away with the necessity of maintaining traveling sales agents and which would secure to the dealers a uniform commission for the handling of the goods, but I do not understand that this was the establishing of a monopoly on the part of the members of the association; for, under the plan adopted, every dealer has the right to purchase goods from the manufacturers upon the same terms as the members of the association, with the right to the same rebate or commissions upon complying with the requirements of the manufacturers with reference to following their price list in making sales of goods. The members of the association clearly had the right to work for their own interests; they had the right to devise and adopt a plan for the conduct of the business in which they could make a commission or a profit, so long as they did not unlawfully interfere with the rights of others. They had the right to petition the manufacturers to adopt the plan devised by them and to support their petition with all of the arguments and persuasions that they could bring to bear, so long as they did not resort to threats or intimidation. The proprietors, having the ⁹ exclusive right to manufacture and sell their goods, had the right to adopt such plan with reference to the disposal thereof as they saw fit, and if they became convinced that the contract or rebate plan, so called, was more advantageous to them and more fair and just to the public, by establishing a uniform price in all sections of the country, they had the right to adopt the same and no one could complain.

Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell or the territory within which they may confine their transactions; but upon the ques-

tion of prices we must bear in mind that the goods are covered by patent rights and trademarks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and following this, the right also to require dealers to maintain the prices specified. The plan does not operate to restrict sales in any localities, but contemplates a ready method of distributing the goods throughout the entire country. It is, in effect, the creating of an agency on the part of the proprietors, by which every druggist throughout the United States may receive the goods and dispose of them as agents of the principal, receiving the commissions agreed upon therefor.

Is this plan against public policy? An active competition and rivalry in business is, undoubtedly, conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein and thus result in a derangement of the business, an inconvenience to consumers, and in public harm. While public policy demands a healthy competition it abhors favoritism, secret rebates and unfair dealing and commends the conduct of business in such a way as to serve all consumers alike. That this is the tendency of modern times is evident from the recent discussions and legislation upon the subject of interstate commerce. One of the cardinal and chief principles of the plan adopted is the ¹⁰ establishing of a uniform price by proprietors which necessitates the service of all persons alike throughout the United States, the proprietors subjecting themselves to the extra expense for freight, etc., in remote sections of the country. I can discover nothing in this which is detrimental to the public policy of the country. The right would certainly not be denied to the manufacturer of a given remedy to adopt the rule that he would only sell it to the jobbers of the country at a certain long price, and would not allow a discount of ten per cent where they refused to maintain his price. In other words, the manufacturer says to the jobbers of the country: I manufacture a medicine that I will sell for one dollar a bottle, and it is my desire that it shall be sold at that price per bottle throughout the country. If you will take consignments of this medicine from me, billed to you, at that price per bottle, I will allow you a rebate of ten per cent, and if I find that you are selling at a lower price than billed to you, I will allow no rebate. If this arrangement is not satisfactory to you, I prefer

to keep my manufactured stock on hand. These are the only conditions under which I will ship my manufactured article.

Surely, there is nothing in this approaching restraint of trade or the violation of the principle of public policy. It is simply allowing a man to do what he will with his own.

I do not understand that the complaint charges that the manufacturers were compelled to adopt the plan by reason of threats or intimidation on the part of the members of the association. It is true that the complaint contains the allegation repeated a number of times, to the effect that the proprietors or manufacturers were prevented from selling the plaintiff proprietary goods, for the reason that they wished to protect themselves "with the wholesale and jobbing druggists." And, also, that at one of the meetings of the association the committee on proprietary goods reported that with a few exceptions the proprietors of all the prominent proprietary medicines had adopted the contract or rebate plan for the sale of their goods, and then concluded its report with the ¹¹ recommendation "that continued and untiring opposition be shown to the sale of the articles of those proprietors who do not adopt said contract or rebate plan for the sale of their goods, or who withdraw from the plan." There is no allegation, however, that this resolution was served upon the proprietors or was otherwise presented to them. The first allegation alluded to does not, as I understand it, amount to a threat when taken in connection with the other allegations of the complaint with reference to the plan devised for the conduct of the business. The proprietors might well deem it to be for their best interests to act in accord with the wishes of the druggists rather than those of the plaintiff. As to the second allegation, untiring opposition was to be continued against the sale of articles of proprietors who did not accept the contract plan, or, in other words, to the sale of proprietary goods under the old system. I do not understand that by this allegation it was intended to charge that the plan adopted prohibited druggists from dealing with proprietors or manufacturers who did not adopt the contract plan with reference to the sale of proprietary goods, for, under other allegations of the complaint, it appears that the failure of a manufacturer to adopt the plan simply left his goods upon the unrestricted list, for which druggists could contract in such manner as they saw fit. This is apparent from the resolution adopted by the association at its Washington meeting in 1890.

Is there any boycott of the plaintiff? It is true many of the proprietors refused to sell to the plaintiff proprietary goods except at the long price, which I understand to be the selling price. They have refused to allow it commissions or a rebate upon the goods purchased, but this refusal is based upon the ground that the plaintiff refused to sell at the prices fixed by the proprietors. The plaintiff can, at any time, avail itself of the right to purchase upon the contract plan by complying with the requirements of the proprietors. The reply made by one of the proprietors to a letter of John D. Park & Sons under date of January 25, 1889, annexed to and made a part of the complaint, answers this question so completely that I ¹² here repeat it: "We think you are in error in calling the action of the association, or the action of any one of its members, 'boycotting.' A boycott means to refuse to sell or do business with a concern, and to prevent anybody else from doing business with a concern on any conditions. This is not the attitude of the association with you. The association has implored you over and over again to abide by your contracts and sell goods as your neighbors do, and you have distinctly defied them and told them that you would do just exactly as you liked. There is no 'boycott' in this, good friends, and nobody knows it better than you do; and you also know that, even if you choose to call it a boycott, you can end the boycott in twenty-four hours by simply agreeing when you sign a document that you will keep it."

Complaint is made with reference to the watching or spying upon plaintiff's business. All there is of this is the watching for the purpose of determining who the druggists were that furnished the plaintiff with proprietary goods in violation of the contract plan under their agreements with the proprietors. I think there is nothing in this calling for the intervention of a court of equity. The whole success of the plan adopted for conducting the business depended upon the faithful observance of the contract of the druggists with the proprietors, for whom they were acting as agents. If one could be permitted to violate his contract it would seriously prejudice all the dealers who lived up to the provisions of their contract and carried it into execution in good faith. As was said in the letter of Parke Davis & Co. to plaintiff's predecessor, under date of February 12, 1889: "The contract in force between us and the members of the Wholesale Drug Association during the three years prior to 1887 was objectionable to

many because of the opportunities offered to those so disposed for an evasion of its provisions; thus, those who lived up rigidly and honestly to their agreement were made to suffer for the benefit of those disposed to regard their agreement and promises simply as a means for taking advantage of others who fulfilled their agreements."

¹³ I am thus brought to a consideration of the reasons for objecting to the plan by the plaintiff. As stated in the allegations of the complaint they are as follows: "That all of the said manufacturers and proprietors who have adopted the said rebate or contract plan for the sale of their respective proprietary goods were persuaded to adopt it entirely by the representation of the benefit which would accrue to the majority of their distributing agents or vendees, the wholesale and jobbing druggists, who were unable to handle the goods as cheaply as the few who could command large capital." It is also alleged that the firm of John D. Park & Sons and this plaintiff since its organization, before the happening of the matters alleged in the complaint, had made large purchases, as wholesale and jobbing druggists, of the proprietary goods of all or nearly all of the various manufacturers, and had it not been for the happening of the matters set forth in the complaint it would have continued to make large purchases as wholesale and jobbing druggists of such goods, and would have been an active and constant competitor of all the other wholesale and jobbing druggists in the United States. The meaning of these allegations is obvious. It is that the plaintiff or the firm of John D. Park & Sons, of which the plaintiff is successor, could command large capital, and by reason of this they could purchase proprietary goods in larger quantities and more cheaply than the other wholesale and jobbing druggists, and that by reason of the adoption of the contract plan the plaintiff was unable to so do. Under the contract plan the price of these goods were made uniform for fixed quantities, and dealers possessing large capital and thereby enabled to purchase in large quantities, could not purchase for a less sum than the ordinary wholesale and jobbing druggist, and not being able to purchase for a less sum could not handle the goods more cheaply. The situation is not new. It is one to which the attention of the public has been frequently drawn in recent years. The great merchants possessed of large capital will persuade and induce manufacturers to sell to them more cheaply in consequence of their

¹⁴ taking large quantities, and thus they are enabled to undersell and drive out of business the small merchants in their vicinity. I am not here going to question the right of the big fish to eat up the little fish, the big storekeeper to undersell and drive out of business the little storekeeper, but I do believe that the little fellows have the right to protect their lives and their business, and if they can by force of argument and persuasion induce manufacturers to establish a uniform price for fixed quantities so that they can purchase as cheaply as the great merchants and thus compete with them in the retail trade, they have the right to do so, and that no court of equity ought to interfere and restrain them from the exercise of this privilege.

The authorities have been largely discussed by my associates. I do not understand that we widely differ with reference to the law. Our chief controversy appears to arise out of the different conclusions to which we have arrived with reference to the allegations of facts contained in the complaint.

The judgment should be affirmed, with costs.

PARKER, C. J. It does not seem to me that this case comes within the principle of *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 79 Am. St. Rep. 655, 58 N. E. 525, *Cohen v. Berlin & Jones Envelope Case Co.*, 166 N. Y. 292, 59 N. E. 906, and kindred cases—and I am not without some acquaintance with those cases, inasmuch as the judgment affirmed in the first case was directed by me at circuit, and the opinion in the last written by me. Nor is there any case in this court, so far as we have found, precisely analogous, but the principle underlying the decision in *National Protective Assn. v. Cummings*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, is applicable for reasons which I shall, as briefly as possible, suggest.

It will be observed that this is not a case where the manufacturers have combined for the purpose of raising prices to the consumer of the remedies they manufacture, nor does it appear that it is the object of the wholesale dealers, who form the aggressive part of this association, to increase the price to the consumer. If the object be to raise the price to ¹⁵ the consumer and thus increase the profits of the manufacturer and the agency by which he passes his goods on to his retail dealers, then it may well be that it is void because in restraint of trade within the principle of the *Union Blue Stone Co.* case and the *Berlin and Jones Envelope Co.* case,

notwithstanding the impression that there may be in some judicial minds, and possibly in others, that proprietary remedies are not entitled to be classed among the necessities of life. The phrase "necessaries of life," as used in connection with the subject of restraint of trade, must certainly be regarded as broad enough to include articles of which the public consume sixty million dollars' worth in a year.

The object of this association, however, is not to fix prices at which the manufacturer's goods must be sold. It attempts no restraint whatever upon the manufacturer in making prices. He may lower or increase the price at his pleasure. In that respect he is precisely as free as he was before the association was formed and he became a member of it. He may name the price which the consumer shall pay for his article now as he could then, which means that he can both make the price and enforce it by contract: *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Fowle v. Parke*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91.

That being so, the query naturally is, What restraint does the association put upon the manufacturer and what can be the purpose of this association which does not seek an increased profit at the expense of the masses?

The answer, as I read the complaint, is that the distributing agencies—the wholesale dealers—by which the manufacturer's goods are passed on to the retailer, where the public may obtain them, have been taught by experience two things: 1. That manufacturers have favorites to whom they will give a larger rebate than to wholesale dealers as a class, and generally the favorite is the person or corporation buying the greatest amount of goods, as strong firms or corporations like this plaintiff with a business of such dimensions that it claims damages in this case of one-half million of dollars; 2. ¹⁶ That there are wholesale dealers who for the purpose of getting clients away from their competitors will give them some part of such extra rebate. To remedy this difficulty was the leading object of the association, and it was sought to be accomplished by placing all the wholesalers upon an equality, so that one should have no advantage over the other in dealing with retail dealers, a result which seems altogether desirable, because it is in the line of fair dealing.

Indeed, the principle which they undertake to secure in this case by contract is like that which the Sherman act attempted to secure in part—namely, equal freight rates to all

interstate commerce shippers from common carriers. Before that act was passed the claim was made, and evidence was adduced in support of it, that rebates of such magnitude were allowed in occasional instances to favorite shippers that it contributed largely, if not entirely, toward driving others out of business, which was deemed so against public policy that Congress set about placing all parties on an equality as to the cost of shipping goods by interstate common carriers. Assuming, as we must, that this legislation was along proper lines for the purpose of protecting the principle of competition at a point where it seemed to be open to attack, it necessarily follows that it is in accord with public policy that these wholesale dealers may attempt to secure to themselves by contract like fair dealing on the part of the manufacturers—namely, that the rebate from the latter's "long prices," which the manufacturer allows as compensation to the wholesaler for distributing the goods to the retailer, shall be alike to all of them.

Before this association was formed, the complaint alleges, there was no fixed rebate, so that the manufacturer could and did allow to some a greater rebate than he did to others, and that such a course of dealing might operate to enable one wholesaler to profit greatly at the expense of the others goes without saying. These agencies for distribution between the manufacturer and the retailer, called the wholesale dealers, set about protecting themselves against what they deemed ¹⁷ unfair competition which resulted to them when a manufacturer saw fit to give some one dealer a much larger rebate than allowed to them as a class.

After forming the association they adopted, first, what is called in the complaint the rebate plan. By that plan the proprietor fixes the price of his article known as the "long price," and agrees to pay expressage and cartage to any point from which it may be ordered. The result is that if the long price is one dollar, the article is sold to the consumer at exactly that price in all parts of the country, which is very important to the proprietors, as they view it; and it must be borne in mind steadily that it is settled by authority that the proprietor of patent medicines has the right to fix the price at which his article shall go to the consumer, and a druggist who takes his articles for sale under an agreement that he will maintain the price is liable to respond in damages if he violates the contract: Garst case and others, *supra*. This plan was found to be insufficient to accomplish the desired result because distributors violated their contracts to sell at the "long price."

The Detroit plan was then devised, and all the proprietors were to sell their goods only to wholesale or jobbing druggists and not to the retail trade, and the committee on proprietary goods, which was composed of wholesale druggists, members of the association, agreed to furnish proprietors lists of wholesalers who could be depended upon to keep their contracts, and cut off lists of dealers who did not keep their contracts or who bought as a mere cover for dealers who were known not to keep their contracts. Under this plan every wholesaler is at liberty to buy all the goods he chooses of the manufacturers and can secure the same rebate as any member of the association, but he has to agree to the plan and he has to keep his agreement. This the plaintiff refuses to do, and, under the agreement which the manufacturers have with this association, they are not at liberty to give plaintiff the benefit of the rebate rate which they give members of the association, so long as he insists upon it that he will not abide by the ¹⁸ rules of the association. He can have all the goods that he wishes provided he pays "long prices" for them, but he cannot buy goods of the manufacturers who belong to this association at any less than the "long price"; in other words, he cannot get the benefit of the rebate unless he will agree to come in and be bound by the rules of the association.

Wholesalers of whom complaint is made are not, therefore, attempting to prevent plaintiff from enjoying all the opportunities for profitable trade which they enjoy, for they have invited him to become a member, indeed, have urged him to do so, and assured him in common with them of every advantage which they possess; but they do attempt to prevent him or any other dealer from making uncertain in its rewards, if not wholly unprofitable, the business of distributing proprietary articles among retail dealers.

Plaintiff once attempted to do business in accord with the association, but apparently reached the conclusion that it would be more profitable to him in the end to deal independently, and so he refused longer to be bound by the rules of the association, and hence the strife between the association and plaintiff which has culminated in this suit, plaintiff seeking to get the benefit of the same or a larger rebate than the members of the association without being bound by its rules, and the association doing its utmost to persuade the manufacturers not to give him the benefit of the rebate so long as he continues to oppose the policy of the association.

The position of the respective contestants is not far different, it will be seen, from that of the parties to the action of *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369. Each is striving as against others to help itself or himself, and the question is here, as in that case, whether defendants in taking such action as they did to prevent plaintiff from getting the business they wanted are violating any rule of law. The wholesale dealers had the right to contract to secure such amount of rebate from the manufacturers as would reasonably compensate them for their services in distribution, together with the money invested. It is not claimed that the rate of compensation agreed upon "was unfair, and if there could be such complaint it is difficult to see who could make it except the manufacturers themselves, and they do not. It was clearly legal for any one of the wholesale dealers to sign the agreement and to bind himself to sell at such prices as the manufacturer of the article should see fit to name as the selling price; the right to fix the price belonging to the manufacturer; it was proper for the wholesaler to agree to recognize that right and govern himself accordingly. He had the right to insist that in consideration of his performing those conditions, in accordance with the wishes of the manufacturer, the latter should not give to other dealers the rebate provided for members of the association unless such dealer should agree to be bound by the same conditions the members of the association took upon themselves; and he had a right to agree that in order to secure the due carrying out of the agreement according to the spirit thereof, he would furnish to the manufacturer such evidence as he might secure from time to time tending to show that members of the association were directly or indirectly violating its rules, and that which he could do alone, he and they could do as members of the association, provided of course their coming together did not operate against the rights of the general public, but as against other selling agents like themselves, no other public interest being affected, there could be no doubt of their right to agree with each other to do what any of them could do alone. The members of the association not only had the right to inform the manufacturers about those members within it and the dealers without it who were violating the plans agreed upon, but they also had the right to take such legitimate and honorable means as were within reach to ascertain what persons were violating the rules, and to give notice of it to all

of the members of the association. But that course operated, says the plaintiff, in effect to deprive me of the opportunity of buying goods on terms as favorable as the defendant wholesale dealers bought them. True, but it may be answered that you could buy them on the same terms as the ²⁰ members of the association, which terms contain conditions governing the sale and the conduct of the members. Instead, you prefer to take the business chances to be found outside of the association, and, before the courts will help you, you must show that the plans of the association, or its conduct under those plans, are unlawful as against you.

The position attempted to be taken at this juncture by the plaintiff is, that granting the plans which the members of the association adopted were legal, nevertheless the wholesale dealers can be proceeded against in this suit, because they compelled some or all of the manufacturers against their will and inclination to refuse to sell their goods to plaintiff by threats, intimidation, blacklisting and other unlawful acts of the association. This language has a formidable sound, but subjected to the same analysis as was given to the word "threats" in the connection in which it was used in *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, it will prove to be without force. There are no threats alleged in this complaint on the part of defendants to do anything except that which they have a right to do, if the views so far expressed be sound, and we said in that case, and it is proper to repeat here, that a man may threaten to do that which the law says he may do, provided that, within the rules laid down in certain cases therein cited, his motive is to help himself. If there be any other "intimidation" of manufacturers than that to be found in the agreements and written plans of this association and the steadfast purpose on the part of its members to carry them out according to their letter, it is not to be found in the complaint. The term "blacklisting" refers to the course of defendants in notifying the trade in effect that the plaintiff is outside of the association, and prefers to stay out of it rather than be bound by the rules and regulations which other members of the trade regard as fairest and best to all, and insisting that the penalties of such a course shall be meted out to him—namely, that he shall not be allowed any rebate upon any of the manufacturers' goods so long as he shall retain that position. The facts alleged by them are true. The notification ²¹ is a part of the plan agreed upon by all,

and the plaintiff courted it rather than do business on the same basis as his competitors, who together handled about ninety per cent of the proprietary articles sold.

The plaintiff's characterization of the acts of the defendants do not establish a cause of action against the defendants if the acts themselves do not, and clearly their acts do not, inasmuch as they are not aimed at preventing the plaintiff or anyone else from participation in the trade to the same extent and on the same basis as themselves, but are intended simply to prevent plaintiff and others from enjoying the same or greater rebates than they get without bearing the burdens which they assume as a condition of receiving them, unless it may be said that the fact that they have agreed upon a basis of transferring the goods from the manufacturer that insures only reasonable profit and security to them as distributing agents is illegal and void. And this would seem to be impossible in view of the fact that the wholesale dealers have not secured the authority to, nor attempted to, restrict either the price or the quantity sold of the goods dealt in. One of these elements has always been present in the cases of the past in this state, in which it has been held that there existed a combination in restraint of trade, which was against public policy and void.

It will be seen, therefore, that this is a controversy between opponents in business, neither side trying to help the public. Nor will the public be the gainer by the success of either. The motive behind the action of each party is self-help. It is the usual motive that inspires men to endure great hardships and take enormous risks that fortune may come. In the struggle which acquisitiveness prompts, but little consideration is given to those who may be affected adversely. Am I within my legal rights? is as near to the equitable view as competitors in business usually come. When one party finds himself over-matched by the strength of the position of the other, he looks about for aid. And quite often he turns to the courts, even when he has no merit of his own, and makes himself, for the time being, the pretended champion of the public welfare, ²² in the hope that the courts may be deceived into an adjudication that will prove helpful to him. Now, while the courts will not hesitate to enforce the law intended for the protection of the public because the party invoking such protection is unworthy, or seeks the adjudication for selfish reasons only, they will be careful not to allow the process of the courts to be made use of, under a false cry that the interests of the public are

menaced, when its real purpose is to strengthen the strategic position of one competitor in business as against another.

I concur with Judge Haight.

The judgment should be affirmed, with costs.

Justice Martin dissented. He referred to the steps which had been taken by the proprietors of proprietary or patent medicines and wholesale druggists which are mentioned in the prevailing opinions, and declared that the various resolutions, contracts, and agreements adopted by the association to prevent plaintiff from conducting a wholesale and jobbing business in proprietary goods tended to destroy plaintiff's business, and that it was being injured and destroyed by the unlawful acts of the defendant; that all allegations of the amended complaint, as well as all reasonable and fair inferences which may be implied therefrom, were admitted by the defendant's demurrer; that, under the recent authorities, pleadings were not to be strictly construed against the pleader, but averments which sufficiently pointed out the nature of plaintiff's claim are sufficient, if, by them, he is entitled to give the necessary evidence to establish a cause of action; that it would be a perversion of the complaint to say that it states a claim or cause of action involving merely the right of a manufacturer to sell his goods to whom he will, but that the question presented by the complaint "is whether individual firms or corporations have a right to enter into a combination or conspiracy to prevent manufacturers of patent medicines from maintaining competition with others in the sale of goods, or from selling them in such manner and upon such terms as they shall desire or agree upon with their customers, and in case they do, whether the members of the combination have a right to boycott such articles and the manufacturer as well." Proceeding, the judge said: "Therefore, in the further discussion of this case we are led to consider, first, whether the purpose for which the combination was formed was lawful; and, second, whether it was to be accomplished by lawful means. As to the purpose it is obvious from the facts alleged that the conspiracy or combination was formed to restrain trade or commerce, to monopolize the sale of goods in common use and to prevent competition therein. Such being its plain purpose it is equally clear that it was unlawful. From a very early day it has been the policy of this state and most other jurisdictions that free and unrestricted competition in all business pursuits must be maintained, and the business maxim that 'competition is the life of trade' has been established and sustained by their courts and legislation. While this principle has not been thus firmly and universally settled without discussion as to whether it does not work a greater hardship than advantage by crushing out weaker competitors and causing disaster to others by reduction of prices, yet, not-

withstanding these arguments, the consideration which the question has received has led to the conclusion that public policy requires the continuance and enforcement of the rule of competition as a principle controlling business affairs in the various commonwealths. This principle of political economy is not based alone upon the theory that combinations to prevent competition will, of necessity, enhance the price, as there are notable instances where such combinations have, even permanently, reduced the price of articles thus traded in or manufactured, but it is founded upon the theory that such combinations may, as they usually will, enhance the price and also drive small and worthy dealers out of business. In *People v. Sheldon*, 139 N. Y. 251, 263, 36 Am. St. Rep. 690, 34 N. E. 785, Andrews, C. J., said: 'The question is, was the agreement in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition one upon which the law affixes the brand of condemnation. It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. . . . The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade, because they are liable to be injuriously used.' The right of the plaintiff to recover in this action does not rest upon the common law alone, as the Revised Statutes provided: 'If two or more persons shall conspire to commit any act injurious to trade or commerce, they shall be deemed guilty of a misdemeanor' (4 Rev. Stats., pt. 4, c. 1, tit. 6, sec. 8, subd. 6), and this was re-enacted in subdivision 6 of section 168 of the Penal Code; while subdivision 5 provided: 'If two or more persons conspire to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats (or) intimidation each of them is guilty of a misdemeanor.' In 1897 the legislature passed an act which provided: 'Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restrained or prevented, is hereby declared to be against public policy, illegal and void': Laws 1897, c. 383, sec. 1. That the acts alleged to have been committed by the de-

fendants were injurious to trade and commerce, created a combination to monopolize the sale of articles in common use, restrained competition in the supply of articles or commodities, and established and maintained a monopoly restricting or preventing trade, is manifest, and, therefore, the combination or conspiracy of the defendants was for an illegal purpose and the acts performed by them under it were also illegal: *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667, 21 N. E. 707; *People v. Fisher*, 14 Wend. 9, 14, 28 Am. Dec. 501; *People v. Sheldon*, 139 N. Y. 251, 261, 36 Am. St. Rep. 690, 34 N. E. 785; *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Curran v. Galen*, 152 N. Y. 33, 37, 57 Am. St. Rep. 496, 46 N. E. 297; *People v. Milk Exchange*, 145 N. Y. 267, 45 Am. St. Rep. 609, 39 N. E. 1062; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 23 N. E. 530; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 79 Am. St. Rep. 655, 58 N. E. 525; *Cohen v. Berlin etc. Envelope Co.*, 166 N. Y. 292, 59 N. E. 906; *Matter of Davies*, 168 N. Y. 89, 101, 61 N. E. 118; *United States v. Freight Assn.*, 166 U. S. 290, 322, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. Rep. 25; *Addyston Pipe etc. Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. Rep. 96; *Beach on Modern Contracts*, sec. 1582; *Richardson v. Buhl*, 77 Mich. 632, 658, 43 N. W. 1102; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 715, 46 N. W. 155; *Craft v. McConoughy*, 79 Ill. 346, 350, 22 Am. Rep. 171; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 298, 17 Am. St. Rep. 319, 22 N. E. 798; *Hawarden v. Youghioghenny etc. Coal Co.*, 111 Wis. 545, 87 N. W. 472; *United States v. Jellico Mountain Coal etc. Co.*, 46 Fed. 432. In *People v. Warden etc.*, 157 N. Y. 116, 132, 68 Am. St. Rep. 763, 51 N. E. 1006, *Parker, C. J.*, very properly said: 'In this one (jurisdiction) it is well established that the public welfare is best subserved by the encouragement of competition.'

"It was held in the *Arnot* case that a contract by one producer with another to withhold his supply from the market was against public policy and void; in the *Curran* case that contracts or arrangements with employers, to coerce other men to join an organization, under the penalty of the loss of their positions, were against public policy, unlawful and in conflict with the principle of public policy which prohibits monopolies and exclusive privileges; and in the *Milk Exchange* case that a corporation to fix the price of milk justified a finding that the corporation was a combination, the purpose of which was inimical to trade, and, therefore, unlawful. In the *McMillin* case a combination was entered into for the management and control of the business of manufacturing carbon, by which several corporations combined, the proceeds to be divided in

accordance with the contract, and it was held illegal and void. In the Judd case an agreement was made for the purpose of suppressing competition in the sale of sheep and lambs, and it was held contrary to public policy and void, and also that the fact that it was entered into for the purpose of protecting those interested from loss by unreasonable competition, made no difference; that the agreement being intended to control the markets, it was invalid, as the public might be prejudiced thereby, and whether they were in fact was immaterial. The Blue Stone case involved a contract by which nearly all that kind of stone was to be sold at prices to be fixed and uniform, the sales to be apportioned between the producers, and it was held that it was void in that it threatened a monopoly whereby trade in a useful article might be restrained and its price unreasonably enhanced. In the Cohen case there was an agreement between the manufacturers of eighty-five per cent of the envelopes manufactured in the country and an outside manufacturer, which provided that the selling price of all envelopes manufactured by them should be fixed by a corporate agent, and it was held that the combination threatened a monopoly whereby trade in a useful article might be restrained and hence it was invalid. In the Freight Association case there was a contract between common carriers which resulted in increasing fare or freight beyond that which would exist if competition was free, and it was held invalid. In Beach on Modern Contracts it is said: 'Combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and intolerable, and ought to receive the condemnation of the courts. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under governmental control, in the interest of the public. But its tendency is destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution.' Thus we see that agreements and acts injurious to trade or commerce, combinations to restrain competition in articles or commodities in common use, and monopolies restraining or preventing trade, have, by a long line of authorities, been held to be illegal.

"This brings us to consider whether the means the association and its active members employed to accomplish their purpose were lawful. It will be remembered that the means adopted by them were that if any dealer or manufacturer sold goods to the plaintiff or any other person not conforming to the requirements of the association, all its active members were required to and refused to sell the goods of such manufacturer, procured others to refuse to deal in his goods, publicly advertised him as an unworthy dealer, and

thus sought to injure and ruin his business. Thus it was that the members of the association accomplished their purpose of preventing other manufacturers from selling goods to the plaintiff. Such means were clearly unlawful: *Temperton v. Russell* (1893), L. R. 1 Q. B. Div. 715; *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373; *People v. Fisher*, 14 Wend. 9, 14; *People v. North River Sugar Refining Co.*, 54 Hun, 354, 3 N. Y. Supp. 401, 7 N. Y. Supp. 406; affirmed, 121 N. Y. 582, 24 N. E. 834; *O. D. Steamship Co. v. McKenna*, 30 Fed. 48; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 146; *Boutwell v. Marr*, 71 Vt. 1, 7; *Doremus v. Hennessy*, 176 Ill. 608, 614, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553.

“In *Temperton v. Russell* (1893), L. R. 1 Q. B. Div. 715, a firm of builders refused to obey certain rules of the trade unions with regard to building operations, and the unions sought to compel them to do so by preventing the supply to them of building materials. In furtherance of this purpose they requested the plaintiff, who supplied building materials to the firm, to cease supplying them, which he refused to do. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who had entered into contracts with him for the supply of materials to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff sustained damage by reason thereof, and the court held that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and for maliciously conspiring together to injure him by preventing persons from entering into contracts with him. In the *Fisher* case *Savage, C. J.*, in effect said that the owner of an article was not required to sell it for any particular price, or for less than a stated price, but he had no right to state the price at which others should sell their goods, and that all combinations to effect such a purpose were illegal. In the *McKenna* and *Casey* cases it was held that all associations designed to interfere with the management and control of lawful business, or in dictating the particular terms upon which its owners should conduct it, by means of threats of injury or loss, by interfering with their property or traffic, or with their lawful employment of other persons, are pro tanto illegal combinations or associations. The same principle was involved in the case of *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297.

“In *Boutwell v. Marr*, 71 Vt. 1, 7, 76 Am. St. Rep. 746, 42 Atl. 607, it was said: ‘Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members

by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion.'

"In *Doremus v. Hennessy*, 176 Ill. 608, 614, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, it was said: 'No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his unlawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill and credit, will sustain an action. . . . Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition.'

"In *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553, it was said: 'Suppose that a number of merchants should agree to fix the price of certain goods, and not to sell below that price; if there were no statute on the subject, and the case rested on the common law, the agreement would simply be nonenforceable; but if they went further, and agreed that, if any other merchant sold at a less price, they would force him to their terms, or drive away those dealing with him, by violence, threats or boycotting, it would cease to be a mere nonenforceable contract, and if, in its execution, damages proximately resulted to such other merchant, he would have a right of action.'

"Before concluding this discussion, there is another aspect of the situation which seems worthy of consideration, or of mention, at least. If the decision of the court below shall be affirmed, it obviously results in an unfair and unjust discrimination by this court in favor of capital or business and against labor, by enforcing the law as to one and refusing as to the other. As we have already seen, this court, in *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, unanimously held that a combination or association of workmen whose purpose was to hamper or restrict the freedom of the citizen in pursuing his lawful trade or calling, through contracts or arrangements with employers to coerce workmen to become members of the organization and to come under its rules and conditions under penalty of loss of their positions and of deprivation of employment, was against public policy and unlawful; while in this case it is held that a combination or association of wholesale dealers in useful articles whose purpose is to hamper and destroy

the freedom of the plaintiff and others to pursue their lawful business, by contracts or arrangements with manufacturers to coerce them to become members of their organization and to come under its rules and conditions under penalty of the destruction of their business, was not against public policy nor unlawful. As these decisions could not be harmonized, they would result in a discrimination in favor of capital or business which could not be sustained upon any just or legal principle known to or established by statute or common law. With the existing conflict between capital and labor, such a distinction would not only be unjust, but extremely unfortunate, especially as it can be justified upon no principle of ethics, law or equity.

“Thus far we have discussed the illegality of contracts involving the creation of monopolies, agreements that prevent competition, and the right of individuals or corporations, by threats, intimidation, or interfering with the business or traffic of others, to enforce or compel parties to enter into contracts in restraint of trade, under the general principles of the common law and the statutes and upon the broad ground that they apply to all lawful contracts or business, subject to very slight limitations. We have regarded the principle of the cases cited and the provisions of the statute as sufficiently broad to apply to all transactions relating to trade and commerce, to the free pursuit of any lawful business, trade or occupation, and to the sale of any article or commodity in common use. The learned court at special term, however, seems to have emphasized and placed great reliance upon the fact that the articles to which this controversy relates were not the prime necessities of life, or articles which were necessary to the existence of man, and also upon the ground that as they were patent medicines each owner possessed a greater right as to their disposition than he otherwise would, including their sale free from competition among dealers to whom they were sold, while the learned appellate division seems to have based its decision upon the ground that patent medicines are not necessities of life as to which public policy might restrain a combination to fix an exorbitant price.

“Obviously the provisions of the statutes and the principles of the decisions to which we have referred are not limited in their application to the necessities of life, but, as we have already seen, they have a much broader application and include all articles and commodities in common use or that are the subject of lawful trade or commerce. In determining whether there has been a conspiracy in restraint of trade, the character of the trade sought to be monopolized is immaterial so long as it is a lawful one: *People v. Duke*, 19 Misc. Rep. 292, 296, 44 N. Y. Supp. 336, 78 N. Y. St. Rep. 336. Nor is the operation of the rule forbidding contract restraining competition limited to trade in necessities of life, but extends equally

and alike to all commodities of commerce: Wire Cloth Case, 19 N. Y. Supp. 413, note. It is apparent from the character of this litigation that the articles and commodities to which it relates are both articles of trade and commerce and such as are in common use. This is obvious when we consider the fact that they amount annually to about sixty million dollars and constitute more than two-thirds of all the drugs and medicines sold in the United States. Therefore, the fact that they may not be necessities of life in the strictest sense is not controlling, and the decision of the courts below cannot be sustained upon that ground.

"Moreover, the fact that the medicines may have been patented or copyrighted, so as to give the owners the exclusive right of sale, can make no difference. It must be constantly borne in mind that the purpose of this action is not to compel the manufacturers, against their will or disposition, to sell their goods to the plaintiff, but its purpose is to enjoin the association, its active members, committees and agents, from compelling manufacturers or dealers, against their will, to refuse to sell their property to the plaintiff by a system of intimidation and boycotting. It is not and cannot be properly claimed that the plaintiff can compel the manufacturers to sell it their merchandise without their consent or against their will, and the fact that it consists of proprietary articles or patent medicines can make no difference whatever. With few exceptions, which have no application here, courts can compel no owner of property to sell or part with his title to it without his consent, or to sell or deliver it to any particular person. So that the rule is the same where a party is the exclusive owner of the property, whether it is patented or not, at least so far as the question here involved is concerned. Besides, there are authorities which hold that patentees or owners of patents cannot legally enter into a combination in restraint of trade, or for the creation of monopolies in the sale of their goods, and that such contracts are unlawful. It is said: 'Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other': National Harrow Co. v. Hensch, 83 Fed. 36, 38, 76 Fed. 667; Parke & Co. v. Druggists' Assn., 84 N. Y. St. Rep. 1064, 50 N. Y. Supp. 1064; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 515, 31 Am. St. Rep. 242, 31 Pac. 581; National Harrow Co. v. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462; Beach on Monopolies and Industrial Trusts, sec. 175; 1 Tiedeman on State and Federal Control of Persons and Property, 412.

"If, however, it were conceded that the possession of their patents authorized the manufacturers to enter into combinations which otherwise would be illegal, still, that principle would have no application

whatever to this case. Here it is not the manufacturers or the patentees who have organized the combination complained of, or who have sought to create a monopoly and prevent competition. The patentees have not forced, or attempted to force, the wholesale druggists to transact their business in any particular manner. But it is the wholesale druggists' association, organized and controlled by the druggists, who have no special property or interest under the manufacturers' patents, who seek to and have enthralled the patentees themselves and such of their customers as will not bow in subjection to a method of transacting their own business, inaugurated and enforced by the association. In other words, the plaintiff desires relief, not from the voluntary act of the patentees or from any combination into which they have voluntarily entered or which they control, but asks to be relieved from a combination of their customers who have by threats and intimidation compelled them, notwithstanding their desire to do so, to refrain from selling their property to the plaintiff or other customers without the consent of the association.

"Hence, by the allegations of the complaint, it is made apparent, not only that the defendants entered into and formed an illegal combination or conspiracy to interfere with the plaintiff's trade by preventing the various manufacturers of these goods from selling them to it and thereby seriously interfered with and injured its business, but it is equally clear that the means employed by them to accomplish that purpose, by threats, intimidation, boycotting and continued and persistent efforts to injure any manufacturer who should continue to deal with it, were also illegal. Therefore, the defendants were not only guilty of an illegal act in combining to injure the plaintiff's business, but were likewise guilty of an illegal combination to accomplish the plaintiff's ruin by illegal and improper means. The purpose being illegal and the means by which it was accomplished being also illegal, it follows that the action of the defendants was illegal and, as against the plaintiff, should be restrained. These considerations lead to the conclusion that the facts alleged in the amended complaint and admitted by the demurrer were sufficient to constitute a cause of action, and that the courts below erred in holding to the contrary and in dismissing the complaint."

Justice Cullen dissenting, concurred in the opinion of Justice Martin, except that he agreed in the opinion of Judge Haight in so far as it asserted that if the only object of the combination were to force manufacturers to sell to each of their number at exactly the same price and upon the same terms, and to sell to no one on any better terms, it might be sustained, but he maintained that the scheme went much further, and required the manufacturer not only to sell at the same price to each jobber, but to compel each jobber

to sell to the customers at the same price by refusing to sell anyone who would not comply with these requirements, and that in this respect the agreement was vicious, and operated in restraint of trade by destroying competition among jobbers.

Unlawful Trade Combinations are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. See, also, the subsequent cases on this question of *State v. Armour Packing Co.*, 173 Mo. 356, 73 S. W. 645, ante, p. 515, and cases cited in the cross-reference note thereto; *National Protective Assn. etc. v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, and cases cited in the cross-reference note thereto. An agreement between the producers of nearly the whole product of a commercial commodity, and a company engaging to sell all of such marketable commodity produced by them for a term of years at prices fixed by them, to apportion the sales between such producers, and no sales to be made except through such company, tends to create a monopoly and is void: *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 79 Am. St. Rep. 655, 58 N. E. 525.

MAHON v. SOUTH BROOKLYN SAVINGS INSTITUTION.

[175 N. Y. 69, 67 N. E. 118.]

A SAVINGS BANK Paying Out Moneys of a Deceased Depositor to a Person not Entitled Thereto cannot be exempted from liability on the ground that it exercised due care, nor because its by-laws provide that all payments made to persons producing a pass-book shall be valid payments to discharge the institution. This by-law must be read with another by-law of the institution declaring that, after a depositor's death, payment must be made to his or her legal representatives. (p. 604.)

J. Warren Greene, for the appellant.

Edward Hymes and Michael Schaap, for the respondent.

⁷⁰ WERNER, J. This action was originally brought by the legal representative of one Ann Caldwell, deceased, who, in her lifetime, had been a depositor in the defendant savings bank, to recover the sum of five hundred dollars, which, at the time of the depositor's death, appeared to her credit upon the books of the bank. The present plaintiff is the executrix of the original plaintiff, who, as the husband of the deceased depositor, procured letters of administration upon her estate ⁷¹ and then brought this action. After the trial and during the pendency of this appeal, the original plaintiff died and the

executrix under his will was substituted as plaintiff herein. The deceased depositor, prior to her marriage with Podmore, the original plaintiff, bore the name of Ann Caldwell, or Colwell, and had in that name, at the time of her death, on deposit with the defendant a sum which, with interest, on the fifth day of December, 1898, the date of the demand herein, amounted to five hundred and twenty dollars. Upon defendant's refusal to pay this amount to the plaintiff this action was brought. The defendant's answer alleged, and its evidence tended to prove, a gift causa mortis from the deceased depositor to one Bridget O'Reilly, to whom the deposit was, in fact, paid by the defendant, but the learned trial court expressly found that no such gift had been made, and the judgment entered upon this decision, which was in the short form, has been unanimously affirmed by the learned appellate division. As this affirmance compels us to assume that there is sufficient evidence to sustain the decision (*Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737), the only question presented by this record, that survives for investigation in this court, is whether it was proper to exclude the evidence offered by the defendant to show its diligence and care in making payment of the deposit in question to Bridget O'Reilly. The entry upon the record is that "Mr. Greene [defendant's counsel] produced evidence tending to show that the bank [the defendant] exercised due care in making the payment." This evidence was excluded, and defendant excepted. The evidence thus offered and excluded is to be considered in connection with the by-laws of the defendant received in evidence, which, so far as material to this discussion, provide that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives. . . . Although the institution will endeavor to prevent frauds and impositions, yet all payments made to persons producing the pass-books issued by it shall be valid payments to discharge the institution."

⁷² We think the evidence was properly excluded. The rule of diligence invoked by the defendant bank applies only to the case of a living depositor. When through a depositor's carelessness his bank-book gets into the hands of a third person who presents it to the bank, the latter may show its care and diligence in making payment to the person presenting the pass-book, and thus protect itself against a second demand for payment by the careless depositor. But this by-law which is designed to protect the bank in such a case must be read in connection with

the other by-law, which provides that after the depositor's death payment must be made "to his or her legal representatives." This latter by-law is for the protection of the depositor who can no longer protect himself, and, therefore, the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril. This is the rule laid down in *Farmer v. Manhattan Sav. Inst.*, 60 Hun, 465, 15 N. Y. Supp. 235, followed in the case at bar on a former appeal in *Podmore v. South Brooklyn Sav. Inst.*, 48 App. Div. 221, 62 N. Y. Supp. 961, and which we now approve.

The judgment herein should be affirmed, with costs.

Parker, C. J., Gray, O'Brien, Martin, Vann, and Cullen, JJ., concur.

Judgment affirmed.

As to the Liability of Savings Bank for making payments on forged orders to a person having possession and presenting the depositor's bank-book, see Kingsley v. Whitman Sav. Bank, 182 Mass. 252, 65 N. E. 161, 94 Am. St. Rep. 650, and cases cited in the cross-reference note thereto. Ordinarily, such payment is no defense to an action by the depositor to recover from the bank the amount so paid: *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59. See, too, *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 54 Am. Rep. 653; *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83, 38 Am. Rep. 498.

SLATER v. SLATER.

[175 N. Y. 143, 67 N. E. 224.]

PARTNERSHIP, Goodwill of.—The Firm Name is Inseparable from the Goodwill and just as much an asset of the firm as the goodwill itself. (p. 607.)

PARTNERSHIP.—Though a Firm Name Consists of the Names of the Two Partners, the right to continue its use is a firm asset, and does not, on the death of one, inure to the benefit of the survivor. (p. 609.)

PARTNERSHIP—Sale of Assets Including the Goodwill—Firm Name.—A purchaser at a sale of the partnership assets, including the goodwill, has the right to continue the use of the firm name, though it consists of the name of the two members, one of whom has died, and such purchaser, whether he be the surviving partner or not, acquires the right to continue to use the firm name upon complying with the provisions of the statute. (p. 609.)

Cross-appeals from a judgment entered in the appellate division of the supreme court in the first judicial department in an action for a partnership accounting.

John A. Garver, for the plaintiffs.

James W. Hawes, for the defendant.

145 O'BRIEN, J. This appeal presents a question of some novelty and considerable importance. It does not seem to have been passed upon directly by this court, at least in the form in which it is now presented. Counsel upon both sides have bestowed upon the question a very thorough examination, and it is quite apparent from the briefs that they have found a wide field in which industrious research has discovered a wealth of learning that has more or less application. It is quite clear that the numerous authorities cited are not all ¹⁴⁶ in harmony, and it would be an endless task to collate them so as to exhibit their true bearing upon this case. The work of reviewing, explaining, and distinguishing these authorities has been done by the learned court below with as much success as it is reasonable to expect from the nature of the question, the condition of the cases and the views of the text-writers upon the subject. It would not be profitable for us to attempt to add anything to the discussion in this respect, and so we must be content to express our own views of the law and its application to this case derived from a somewhat diligent study of what has been said and decided in the very numerous precedents to which we have been referred by counsel.

The question is, whether in an action for an accounting between the widow and executrix of a deceased partner and the surviving partner, the firm name of the partnership, under which the business was transacted for more than forty years, is a part of the goodwill and partnership assets, subject to sale and purchase under the decree, in the same way and with like effect as all the other assets of the firm directed to be sold and conveyed. This question arises in the case upon a state of facts found at the trial court, as to which there is no dispute or controversy. The firm of J. & J. Slater, composed of two brothers, was formed in 1859, to manufacture and deal in boots and shoes under that firm name, each partner sharing the profits and losses equally. The business was carried on continuously from that time until the year 1901, when the elder brother John died, leaving the defendant James, the other partner, sole survivor. The deceased left a will in which the plaintiff,

his widow, and James, the brother, were appointed executrix and executor. The surviving partner has continued the business under the same firm name, at the same place and in the same manner since his brother's death, with the view of closing out the business as a going concern, and this was the situation when the action was commenced for an accounting and distribution of the assets. Besides the bills receivable, merchandise and fixtures on hand, the firm had ¹⁴⁷ leases terminating in 1907 of the store and premises in the city of New York, where the business had been conducted.

The trial court directed that the entire assets of the firm be sold at auction under the direction of a referee, including the leases and all other firm property as one parcel. The court decided that the right to continue the use of the firm name was not a firm asset, nor a part of the goodwill, and that the estate of the deceased partner had no interest therein, but that it belonged to the survivor and should not be included in the sale of the firm assets, and to this part of the decision the plaintiff excepted.

On appeal to the appellate division that court modified the judgment in this respect, namely: That the firm name is a firm asset and a part of the goodwill, and that the estate of the deceased had an equal right and interest therein, and that the goodwill to be sold under the decree includes the exclusive right of the purchaser to hold himself out as the successor of the firm and its business, but that such goodwill does not include the right to continue the business in the old firm name, unless such purchaser be the surviving partner, and with this modification the judgment was affirmed. Both parties have appealed to this court from the judgment as thus modified, and the learned court below has certified to us the following questions of law involved in the case:

1. Whether or not upon the facts found in the decision of this case, the firm name of J. & J. Slater, or the right to continue its use, is a firm asset; or did the right to continue such use inure to the surviving partner?

2. Whether or not, upon the facts found in the decision of this case, a purchaser at a sale provided for in the judgment herein, not being the surviving partner (the defendant, James Slater), will acquire the right to continue the business under the firm name of J. & J. Slater, upon complying with the provisions of sections 20 and 21 of the partnership law?

We think that the learned court below was correct in so far as it decided that the firm name was inseparable from the good-

will, and hence just as much a part of the assets of the firm as ¹⁴⁸ the goodwill itself. This proposition seems to be supported by the great weight of authority: Pollock on Partnership, art. 39; 2 Lindley on Partnership, *445; Allan on Goodwill, 81; 2 Bates on Partnership, sec. 672; 1 Collyer on Partnership, 572; Churton v. Douglas, Johns. Ch. (Eng.) 174; Levy v. Walker, L. R. 10 Ch. Div. 436, 449; Banks v. Gibson, 34 Beav. 566; Rogers v. Taintor, 97 Mass. 291; Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 94, 43 N. E. 325; Lane v. Smythe, 46 N. J. Eq. 443, 19 Atl. 199; Fenn v. Bolles, 7 Abb. Pr. 202. The learned counsel for the defendant has cited some authorities that seem to point in the other direction. They are mostly cases where the question in the form now presented was not involved. Many of them are cases in the English courts where it was held in a general way that a property right could not be acquired in a name pure and simple. That may be true in its application to individuals and individual names, but with respect to the name and style under which business has been conducted by a partnership firm for a long series of years the firm name necessarily becomes attached to and part of the goodwill and inseparable from it. Of course the partners may by agreement between themselves, express or implied, change this rule. The cases in which the courts have dealt with the claim or right to assume some individual name or title have no application to the case of a partnership accounting where it is conceded that the goodwill is a part of the assets.

The learned court below while holding that the firm name was a part of the goodwill, and hence partnership assets, placed a restriction or limitation upon its use to the purchaser and the right to sell it that may materially affect its value and go far to impair the property which it is conceded the plaintiff has in the goodwill as a part of her husband's estate. Conceding that the firm name is a part of the goodwill and is partnership assets, it follows that it should be sold without any restriction or limitation upon its use by the purchaser, and in the same way and with like effect as in the case of all the other assets of the firm. If the firm name is partnership ¹⁴⁹ property in any sense, the estate of the deceased partner is entitled to the benefits in the same sense that it is entitled to share in the distribution of the other property. But the modification of the judgment is substantially to the effect that, although it is subject to sale

under the decree, yet no one can buy it for absolute use except the surviving partner himself.

This conclusion seems to be based upon the effect which the learned court gave to the several statutes which from time to time have been enacted in this state since 1833 and which are now embodied in the partnership law: Laws 1833, c. 281; Laws 1854, c. 400; Partnership Law, Laws 1897, c. 420, secs. 20, 21. We think that these statutes have no bearing upon the question presented by this appeal. They were intended to protect the public against the use of a name or names in a business firm that did not represent an actual partner: *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533. These statutes made no change in the law concerning the right and interest of the deceased partner's estate in the firm name. They did not change the nature or character of the goodwill in a case like this. If the right to the use of the firm name was a part of the partnership assets in which the estate of the deceased partner was entitled to share before the passage of these statutes, the plaintiff's right in this case to so share remains unaffected by the legislation. Nor do we think there is any difficulty or embarrassment in selling the firm name as a part of the goodwill so far as the surviving partner is concerned. All the assets of the firm are by the terms of the decree to be sold as one parcel and the firm name should pass with the establishment. It is true that the purchaser, whoever he may be, will upon this view be entitled to assume a business name while a member of the old firm is still living, but this cannot occasion any embarrassment or difficulty to the survivor. The purchaser is required to make the real facts a matter of public record, from which it will appear who the members of the firm really are. No legal liability can attach to the survivor from any dealings between the purchaser of the firm name and third parties or the public. The survivor cannot be made ¹⁵⁰ liable in any sense for the debts or obligations of the parties who transact business under the firm name acquired under the decree. The principal purpose of the statutes above referred to was to render such a result impossible.

It follows, therefore, that the questions certified should be answered substantially in the affirmative in the following form, that is to say: 1. On the facts of this case the right to continue the use of the firm name is a firm asset and does not inure to the benefit of the surviving partner; 2. The purchaser at the sale provided for in the decree, whether surviving partner or

otherwise, will acquire the right to continue the business under the firm name upon complying with the provisions of the statute.

The judgment shall be modified on the plaintiffs' appeal so as to direct the sale of the goodwill with the other assets, including the right to use the firm name, without conditions, restriction or limitations upon the purchaser, and as so modified affirmed, with costs to both parties payable out of the partnership fund.

Parker, C. J., Gray, Vann, Cullen, and Werner, JJ., concur.

Bartlett, J., absent.

Judgment accordingly.

THE GOODWILL OF A PARTNERSHIP, AND THE MEANS OF MAKING IT PRODUCTIVE ON THE DEATH OF A MEMBER OR DISSOLUTION OF A FIRM.*

- I. Partnership Goodwill Defined.
- II. Right to Use the Firm Name.
- III. Distinction Between Commercial and Professional Partnership Regarding Goodwill.
- IV. Goodwill as Partnership Asset.
- V. Sale by One Partner to Another.
 - a. Right of Seller to Set Up Business.
 - b. Personal Solicitation.
 1. Conflicting Views.
 2. Reasons for Denying the Right.
 3. Reasons for Allowing the Right.
- VI. Valuation of the Goodwill.
- VII. How It may be Made Productive.
 - a. By Sale.
 - b. Appointment of a Receiver.
 - c. Injunction.
 - d. Duty of Retiring Partner.
- VIII. When Goodwill does not Attach.
 - a. When Sale cannot be Compelled.
 - b. By Agreement—Secret Partnership.

I. Partnership Goodwill Defined.

In the early English case of *Crutwell v. Lye*, 17 Ves. 335, Lord Eldon defined the goodwill of a business as nothing more than the probability that the old customers would resort to the old place; and this definition has been approved and followed in this country to some extent: *Porter v. Gorman*, 65 Ga. 11; *Cassidy v. Metcalf*, 1 Mo. App. 593. Other definitions may be found in *Farwell v. Huling*, 132 Ill. 112, 23 N. E. 438; *Douthart v. Logan*, 86 Ill. App. 294; *Chittenden*

*REFERENCE TO MONOGRAPHIC NOTE.

Right to establish a rival business after the sale of goodwill: 48 Am. Rep. 223.

v. Witbeck, 50 Mich. 401, 15 N. W. 526; Meyers v. Kalamazoo Buggy Co., 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; Rice v. Angell, 73 Tex. 350, 11 S. W. 338.

This definition is not broad enough to cover the more valuable right where a retiring partner sells the goodwill of the firm to one of his partners: *Churton v. Douglas*, Johns. Ch. (Eng.) 174, 5 Jur., N. S., 887, in which case Vice-chancellor Wood, after commenting upon Lord Eldon's definition, continued: "Goodwill, I apprehend, must mean every advantage—every possible advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business": See, also, *Ginesi v. Cooper*, L. R. 14 Ch. Div. 596.

As property, goodwill is intangible, and only an incident of other property. It is, generally speaking, an incident of the locality or place of business, and not of the stock of merchandise: *Rawson v. Pratt*, 91 Ind. 9. Where a partnership had ceased by its own limitation, it was held in *Mussulman's Appeal*, 62 Pa. St. 81, 1 Am. Rep. 382, that there could be no goodwill of a business in favor of the members thereof, and that as a distinct property it was gone, it then attaching to and enhancing the realty.

II. Right to Use the Firm Name.

There is some question among the authorities as to how far a transfer of the goodwill of a partnership includes the right to make use of the firm name. In *Churton v. Douglas*, Johns. Ch. (Eng.) 174, 5 Jur., N. S., 887, the firm name is held to be an important part of the goodwill. So the assignment of a business and goodwill includes the exclusive right to use the name of the old firm: *Levy v. Walker*, L. R. 10 Ch. Div. 436; and in *Bank v. Gibson*, 34 Beav. 566, the court held that if the whole concern and goodwill were sold, the name as a trademark passed with it. This decision is cited and followed in *Caswell v. Hazard*, 50 Hun, 230, 2 N. Y. Supp. 783, distinguishing *Morgan v. Schuyler*, 79 N. Y. 490, 35 Am. Rep. 543, in the following words: "In the case last cited, the parties were partners in the business of dentistry. On the dissolution of the firm the defendant purchased a portion of its property and assumed payment of the rent of the premises previously occupied by both partners. It was mutually understood that the plaintiff was to continue business as a dentist in the same city, and there was nothing in the agreement of dissolution which transferred the goodwill of the firm to either of the parties. Upon these facts, the court of appeals held that the defendant had not become entitled to continue the use of the firm name or to hold himself out as the successor of the firm. In the course of the opinion, Danforth, J., after citing three of the

cases referred to by the counsel for the appellant, says that the goodwill in question 'was that only which pertained to the place of business, and no case holds that the goodwill included the right to a continued use of the name of the firm.' On the present appeal the respondent relies strongly upon this language as decisive to the effect that no sale or transfer of the goodwill of a copartnership, even though it comprise that which pertains to the business itself, as well as to the place of business, can convey a right to employ the firm name.

"I am inclined to think, however, that this is too broad a construction of the words used by the learned judge, and that his meaning was only that such goodwill as attaches merely to the place of business has never been held to include the right to use the firm name, for, as we have seen in *Banks v. Gibson*, 34 Beav. 566, the master of the rolls expressly decided that where both the whole concern and the goodwill were sold, the name as a trademark went with it": See, also, *Fenn v. Bolles*, 7 Abb. Pr. 202. The firm name is part of the goodwill, and the seller cannot use it: *Brass etc. Co. v. Payne*, 50 Ohio St. 115, 33 N. E. 88. For a case in which the goodwill was held to authorize the use of the firm name, see *Rogers v. Taintor*, 97 Mass. 291; but in *Fite v. Dorman* (Tenn.), 57 S. W. 129, under the facts of that case the court held that the right to the firm name did not pass as an incident to the transfer of the goodwill.

Several decisions of the New York courts are to the effect that the right to the firm name is not part of the goodwill upon the dissolution of the partnership by the death of a member, and it remains in the surviving partners: *Blake v. Barnes*, 12 N. Y. Supp. 69, 26 Abb. N. C. 208; *Campbell v. Campbell*, 40 N. Y. St. Rep. 817, 16 N. Y. Supp. 165; *Mason v. Dawson*, 15 Misc. Rep. 595, 37 N. Y. Supp. 90; *Kirkman v. Kirkman*, 20 Misc. Rep. 211, 45 N. Y. Supp. 373.

III. Distinction Between Commercial and Professional Partnerships Regarding Goodwill.

In commercial or trade partnerships only can goodwill exist, and it cannot arise in a professional business depending on the personal skill and confidence in the particular partner: *Douthart v. Logan*, 86 Ill. App. 294, in which case it was held not to exist where the business was buying and selling produce on commission. The following cases are there cited, showing to what professional or personal partnerships goodwill has been held not to attach: *Farr v. Pearce*, 3 Madd. 74, a partnership between surgeons; *Arundell v. Bell*, 61 L. J., pt. 1, 537, and *Austen v. Boys*, 24 Beav. 598, on appeal, 2 De Gex & J. 626, between solicitors; *Steuart v. Gladstone*, 10 L. R. Ch. Div. 626, between commission merchants; *Rice v. Angell*, 73 Tex. 350, 11 S. W. 338, and *Tierney v. Klein*, 67 Miss. 173, 6 South. 739, 8

South. 424, between insurance agents; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37, relating to a contract between physicians. See, also, *McCall v. Moschowitz*, 10 Civ. Proc. Rep. (N. Y.) 107, where the business was dressmaking; and *Smith v. Smith*, 51 La. Ann. 72, 24 South. 618, another case of an insurance agency.

A partnership to publish a newspaper is commercial in its nature, and goodwill may attach thereto, and is partnership property: *Holden v. McMakin*, 1 Par. Eq. Cas. (Pa.) 270. And see *Lane v. Smythe*, 46 N. J. Eq. 443, 19 Atl. 199.

IV. Goodwill as Partnership Asset.

It was formerly held in England that the goodwill of a firm was not part of the partnership stock, so that the personal representative of a deceased partner could compel a sale thereof, but that it went absolutely to the surviving member: *Hammond v. Douglas*, 5 Ves. 539; *Lewis v. Langdon*, 7 Sim. 421.

This doctrine has, however, been overruled in England, and both in that country and in the United States the goodwill of a firm is considered as an asset of the partnership, which may constitute its most valuable possession, and as such the estate of a deceased partner is entitled to share therein to the same extent as in the case of corporeal partnership stock; and the same holds good where the firm is dissolved by one partner buying out the other: *Iowa Seed Co. v. Dorr*, 70 Iowa, 481, 59 Am. Rep. 446, 30 N. W. 866; *Remick v. Emig*, 42 Ill. 342; *Guerand v. Dandélet*, 32 Md. 561, 3 Am. Rep. 164; *Sheppard v. Boggs*, 9 Neb. 257, 2 N. W. 370; *Fenn v. Bolles*, 7 Abb. Pr. 202; *Williams v. Wilson*, 4 Sand. Ch. 379; *Howe v. Searling*, 6 Bosw. 354; *Dougherty v. Van Nostrand*, 1 Hoff. (N. Y.) 68; *Dayton v. Wilkes*, 17 How. Pr. 510; *Bininger v. Clark*, 60 Barb. 113; *Mitchell v. Read*, 19 Hun, 418, affirmed in 84 N. Y. 556; *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 86, 43 N. E. 325; *Holden v. McMakin*, 1 Pars. Eq. Cas. (Pa.) 270; *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Mellersh v. Keen*, 27 Beav. 236; *Smith v. Everett*, 27 Beav. 446; *Willett v. Blanford*, 1 Hare, 253; *Trego v. Hunt*, [1896] App. Cas. 7; *Matter of David*, L. R. 1 Ch. (1899) 378; and the same rule applies to an expelled partner, he being entitled to his share of the value of the goodwill: *Steuart v. Gladstone*, L. R. 10 Ch. Div. 626.

Where a firm is dissolved by the death of a member and the surviving partners carry on the business to preserve the goodwill, that the business may be sold as a going concern, the amount thus saved to the firm from the goodwill is in the nature of profits: *Cameron v. Francisco*, 26 Ohio St. 190.

V. Sale by One Partner to Another.

a. **Right of Seller to Set Up Business.**—A mere sale of the goodwill by one partner to another does not prevent the former from setting up business again, in the absence of an agreement to the

contrary, but he cannot use the firm name so as to deceive the public: *Dethlefs v. Tamsen*, 7 Daly, 354; *Churton v. Douglas*, Johns. Ch. (Eng.) 174, 5 Jur., N. S., 887. And this same restriction applies to the buying partner, so where one partner sold all the real and personal property of the firm to the other, without any mention of goodwill, it was held that the continuing partner could not use the old firm name so as to give the public good cause to believe that the retiring partner was still associated therein, if such was injurious to him in his own business: *McGowan Pump etc. Co. v. McGowan*, 22 Ohio St. 370; and he cannot describe himself as "successor of" the firm, but may as "formerly" or "late" thereof: *Morgan v. Schuyler*, 79 N. Y. 490, 35 Am. Rep. 543. In *Dyer v. Shove*, 20 R. I. 259, 38 Atl. 498, where there was no sale of the goodwill upon dissolution, each partner was held to have an equal right of access to the books and lists of customers, to compete for a continuance of their business, and to use the firm name.

b. Personal Solicitation.

1. **Conflicting Views.**—As to the right of personal solicitation, the authorities present two views, which are thus stated in *Webster v. Webster*, 180 Mass. 310, 62 N. E. 383: "The decisions in different jurisdictions touching the rights of the vendor and of the purchaser resulting from the sale of a business with the goodwill belonging to it, are somewhat in conflict. In England the rule now established seems to be that on a sale of a general mercantile business with the goodwill belonging to it, the vendor is not precluded from establishing a new business of the same kind, which may come in competition with that which he sold, so long as his efforts are not directed against those activities and projects which, in a sense, may be said to belong to the business for which he has been paid. In a late case (*Trego v. Hunt*, [1896] App. Cas. 7), it was held, overruling *Pearson v. Pearson*, 27 Ch. Div. 145, that a copartner about to leave a firm under a previous arrangement that the goodwill should belong to his copartners who remain, had impliedly agreed to do nothing to deprive the others of the benefit of the goodwill, and that taking the names of the customers of the firm from the books, with an avowed purpose to solicit their trade for a new business of the same kind which he was about to establish, called for an injunction against such solicitation. At the same time, his right to establish a new business in competition with the other, so long as he did not attempt direct interference with the customers of the firm, or with the particular business then being done by it, was recognized. The decisions in America are far from uniform. The cases of *Cottrell v. Babcock Printing etc. Co.*, 54 Conn. 122, 6 Atl. 791, *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446, *Ward v. Ward*, 15 N. Y. Supp. 913, 61 Hun, 625, *Close v. Flesher*, 8 Misc. Rep. 299, 28 N. Y. Supp. 737, and *Vonderbank v. Schmidt*, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 South. 616, tend to show that after having sold the goodwill of a firm, a former partner in it may endeavor to obtain

trade of its old customers, not only by public advertisement, but also by direct and personal solicitation. Cases in New Jersey and in Ohio hold that such solicitation is in violation of his implied contract to do nothing directly to imperil the value of that which he has sold: *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *Burekhardt v. Burekhardt*, 36 Ohio St. 261." But see *Brass etc. Co. v. Payne*, 50 Ohio St. 115, 33 N. E. 88.

2. **Reasons for Denying the Right.**—The reasons for denying the right of personal solicitation are stated in *Trego v. Hunt*, [1896] App. Cas. 7, by Lord Herschell, to be as follows: "It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the goodwill and an endeavor to destroy it. If a person who has previously been a partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm, he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold and to restore it to himself. It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business, but this in many cases appears to me of little importance, and of small practical advantage, if canvassing the customers of the old firm were allowed without restraint. . . . It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which he has sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity. I have so far dealt with the case as if the goodwill had been sold, but I think the rights and obligations must be precisely the same for present purposes when, on the creation of a partnership,

it has been agreed that the goodwill shall belong exclusively to one of the partners."

Where one partner bought out the other, and the articles provided that the outgoing partner might set up a similar business in the neighborhood, this was held not to authorize him to solicit the old customers: *Gillingham v. Beddow*, 69 L. J. Eq. 527, (1900) 2 Ch. 242; and the purchasing partner is entitled to an injunction to restrain the vendor from canvassing the customers of the old firm, where the former bought the assets, although the goodwill was not specifically mentioned: *Jennings v. Jennings*, 67 L. J. Eq. 190, (1898) 1 Ch. 378.

3. Reasons for Allowing the Right.—In *Cottrell v. Babcock Printing etc. Co.*, 54 Conn. 122, 6 Atl. 791, the other view is advocated. There the court, after speaking of the doctrine distinguishing between solicitation in person and by advertising in general, continues: "Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers, even, would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade either totally or partially; and that all restraint of that nature must come from his positive agreement. And such we think is the present tendency of the law."

VI. Valuation of the Goodwill.

The goodwill being of such importance as a partnership asset, it becomes necessary to determine in each particular instance its value.

The partner claiming an allowance for his share of the goodwill upon the dissolution of a firm must show its value by evidence, and if none is shown to have attached, he can, of course, receive nothing in that connection: *Farwell v. Huling*, 132 Ill. 112, 23 N. E. 438. See, also, *Fay v. Fay* (1886, N. J.), 6 Atl. 12.

In *Rice v. Buggott*, 54 Hun, 637, 7 N. Y. Supp. 518, the court quoted Lindley on Partnership: "The value of the goodwill of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business had been previously carried on"; and held the fact that the selling partner had opened a similar business in the neighborhood was to be taken into consideration in arriving at a valuation of the goodwill.

The court, in *Hall v. Barrows*, 4 De Gex, J. & S. 150, said: "The direction to value the goodwill should be accompanied by a declaration defining what is meant by it, at least negatively—that is to say, a declaration that the goodwill is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business." But the fact that the surviving partner would not be at liberty to solicit the customers of the old firm should be taken into account in estimating its value: *Matter of David*, L. R. 1 Ch. (1899) 378.

The value of goodwill of a firm is held in *Rammelsberg v. Mitchell*, 29 Ohio St. 22, to be based on the mere probability that the

customers of the firm, and others induced by its reputation, would deal with its successor, and is not an item of assets for distinct and separate valuation, but is an element in the value of the tangible property of the firm.

In *Howe v. Searing*, 6 Bosw. (N. Y.) 354, the court, speaking of a decree of Lord Eldon, hold that the following points may be deduced therefrom: "A partnership having terminated by lapse of time, there was nothing to prevent some of the members from forming a new establishment to carry on the same business; that the goodwill, treated as the value of the chance of customers continuing to deal, could not be estimated upon the same principle as when a retiring partner sold his whole interest to continuing partners, and retired from the trade altogether. A buyer of the premises, the leasehold, shop, etc., would purchase something which could not be treated as of no speculative value, or not to be regarded in the sale. He would get the chance of retaining the old customers, getting them to come to the old place; but this chance and therefore the value, would be materially affected by the probability of the customers following the former members to their new establishment."

Where a retiring partner is paid for the goodwill, agreeing not to engage in business in opposition to him so close as to injure him in business, but he does nevertheless, evidence of the falling off of the receipts of the continuing partner without specific proof of the loss of any individual customers, is sufficient to warrant awarding damages: *Dethlefs v. Tamsen*, 7 Daly (N. Y.), 354.

VII. How It may be Made Productive.

a. **By Sale.**—The goodwill arising from the contract obligation on the part of a retiring member of a firm to refrain from competing with the other members, is a valuable right, and, arising in contract and being based on a sufficient consideration, will be recognized and protected by the courts: *Lobeck v. Lee etc. Co.*, 37 Neb. 158, 55 N. W. 650.

Upon dissolution of partnership, a court of equity may order the assets, of which the goodwill is a part, sold or disposed of in such manner as it may deem most advantageous to the members of the firm, or may permit a partner to retain them upon full payment to his copartner of the value of his interest: *Sheppard v. Boggs*, 9 Neb. 257, 2 N. W. 370. The court, however, cannot compel the continuing partners to take the goodwill at a valuation, but it must be sold like other partnership property, if not disposed of by consent: *Dougherty v. Van Nostrand*, 1 Hoff. (N. Y.) 68.

A partner can make a valid sale of the goodwill separately from the plant and property of the business, and the book debts, and they need not be sold together: *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620. Where the surviving partner appropriates the goodwill to his own use, he may be compelled to account to the estate of his de-

ceased partner for its value: *Rammelsberg v. Mitchell*, 29 Ohio St. 22.

b. Appointment of a Receiver.—In order to preserve the goodwill, the court will appoint a receiver, who must carry on the business under the court's direction till a sale: *Marten v. Van Schaick*, 4 Paige, 479. In *Williams v. Wilson*, 4 Sand. Ch. 379, a partnership which conducted an insane hospital was broken up by controversies between the partners. The court appointed a receiver, whose duty it was to sell the entire business and goodwill, and held that in order to give efficacy to the sale of the goodwill either of the partners might purchase it.

c. Injunction.—Courts of equity, in protection of property rights, will restrain by injunction a wrongful appropriation of the goodwill by one partner to the exclusion of another: *Bininger v. Clark*, 60 Barb. 113; *Matter of David*, L. R. 1 Ch. (1899) 378; so where partners sell out their interest in the goodwill of a business, they will be enjoined from carrying on a similar business under a name likely to mislead and draw off customers: *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545.

Where, however, partners had been conducting a hotel business under a lease, the representative of a deceased partner cannot enjoin the surviving partner from separating the partnership furniture from the rest of the hotel property, claiming that its value depends on its use in connection with the goodwill of the property, and that irreparable injury would be caused the estate in the firm assets by such separation: *Chittenden v. Whitbeck*, 50 Mich. 401, 15 N. W. 526; *Whitbeck v. Chittenden*, 50 Mich. 426, 15 N. W. 537.

d. Duty of Retiring Partner.—The retiring partner is under no obligations to refrain from injuring the business of the other partner, provided he does not do so directly. So where one member of a firm transferred to the other the goodwill, he was guilty of no wrong in advising a creditor to attach the property: *Kellogg v. Totten*, 16 Abb. Pr. 35, where the court said: "The seller may expose the defects of what he has transferred to another, and thus depreciate it in the hands of the purchaser; and although such conduct would be discreditable, yet it would not subject him to an action. The purchaser of the goodwill of an establishment has no greater rights than other dealers, except that the seller shall not impair the goodwill by any direct action; and if he should attempt to do that, he may be restrained by an injunction. But the seller may do many things which may consequently be equally prejudicial, without subjecting himself to an action."

VIII. When Goodwill does not Attach.

a. When Sale cannot be Compelled.—The court in *Lobeck v. Lee etc. Co.*, 37 Neb. 158, 55 N. W. 650, quotes from *Parsons on Partner-*

ship, page 263: "The executor of a deceased partner can realize the share of the deceased in the goodwill only when he can compel a sale of the stock and premises, and then the goodwill goes with them. For, as a general rule, by the conveyance of a shop or store, the goodwill of the business carried on in it passes, although nothing is said about the goodwill. And if an executor cannot compel a sale of the premises, or, as it seems, if the premises are not in fact sold, the executor gets no advantage from the goodwill, for that remains entirely with the surviving partners who carry on the same business in the same place."

That the goodwill ordinarily passes by a sale of the partnership effects, though not expressly mentioned, see *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 86, 43 N. E. 325.

b. By Agreement—Secret Partnership.—Where a party, on forming a copartnership with another, agreed to leave the place where the business was carried on at the end of a year, it was held that he could not claim an interest in the goodwill of the business: *Van Dyke v. Jackson*, 1 E. D. Smith (N. Y.), 419. And where one partner sued another for an accounting, the goodwill was not to be taken into consideration, where the partner sued had conducted the business in his own name, and the fact of partnership was kept secret: *Smith v. Wood*, 12 N. Y. Supp. 724, 36 N. Y. St. Rep. 847.

MONNIER v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[175 N. Y. 281, 67 N. E. 569.]

RAILWAYS.—A Rule Exacting Train or Increased Rates of a Passenger who does not purchase a ticket before entering the car is a valid and reasonable regulation, which it is the duty of the conductor to enforce, and of the passengers to conform to. (p. 621.)

RAILWAYS.—It is not the Duty of a Conductor to Inquire and Determine whether a ticket office was kept open as required by law, before the departure of a train. He is authorized to exact train rates of any passengers whom he finds to be without a ticket. If there is some fact or omission not apparent on the face of the transaction, the passenger must resort to some other remedy for his grievance besides resistance to the conductor. (p. 622.)

RAILWAYS—Passenger's Right to Resist Conductor.—A passenger who was unable to procure a ticket before the starting of a train, because the ticket office was not kept open for the full time specified by law, and of whom the conductor therefore demanded train rates, is not justified in refusing to pay such rates and in resisting the conductor who undertakes to put him off for nonpayment of the fare demanded, though the passenger offers to pay the price

of a ticket when bought at the station. He should pay the train rate as demanded, or peaceably submit to expulsion from the train, and pursue his remedy in either event by an action against the corporation. (p. 624.)

Thomas D. Watkins, for the appellant.

D. F. Searle, for the respondent.

283 O'BRIEN, J. The plaintiff has recovered damages for an assault and battery committed upon his person by one of the defendant's conductors on the sixteenth day of November, 1900, when the plaintiff was in one of the defendant's cars as a passenger from Oriskany to Utica. There is little, if any, dispute about the facts. It appears that on the day mentioned the plaintiff went to the defendant's station at Oriskany to take passage upon the local train to Utica. The office for the sale of tickets located at the station was open for an hour before the departure of the train, but from five to ten minutes before the train pulled out the ticket agent was absent from the office, as he was obliged to pass over on the opposite side of the track, a short distance, to look after an express package, and before he returned the train pulled out and the plaintiff entered one of the cars without any ticket. We must assume from the verdict of the jury that the plaintiff boarded the car without a ticket, for the reason that the ticket agent was absent from the office from five to ten minutes before the train started, and therefore the plaintiff was unable to procure a ticket. Two other passengers entered the train at the same station, but both of them had procured tickets. Soon after leaving the station the conductor passed through for the purpose of taking up the tickets. The two other passengers who entered the train at the same station handed him their tickets, but when he came to the plaintiff he was told that as the office was closed he had no ticket.

284 The plaintiff then tendered fifteen cents to the conductor as the fare to Utica, but the conductor told him that the fare was nineteen cents when the person had no ticket. The plaintiff replied that the ticket office was not open and he could not get a ticket and that he would pay the price of a ticket, but no more. The conductor again told him that the fare was nineteen cents, and demanded that amount, telling him at the same time that if he did not pay it he must get off at the next station, and the plaintiff's answer was, "I will pay the New York Central Company all the law allows them." On arriving at the

next station the plaintiff, in response to a similar request, refused to pay the nineteen cents, but offered to pay fifteen cents. When the plaintiff refused to pay the sum demanded, the conductor stopped the train at the station and put him off. The plaintiff resisted the conductor, but he was overpowered and finally removed from the car, the conductor using no more force than was necessary. The plaintiff then took a street-car to Utica, the fare being ten cents. The conductor inquired of the other passengers who entered the car at Oriskany if they had purchased their tickets at the station that morning and they told him that they had, but at the same time they corroborated the plaintiff's statement that the ticket agent had stepped out of the office and across the track a short time before the train started. The removal of the plaintiff from the car in the manner and under the circumstances stated is the assault and battery of which he complains and for which he recovered the damages. The right of the plaintiff to recover was challenged by defendant's counsel, by a motion at the close of the case and by requests to charge, all of which were denied or refused by the learned trial judge, and exceptions taken.

This case presents the question whether the plaintiff had any right to resist the conductor when he was ordered to leave the train. The right of the conductor to remove a passenger from the car when the latter refuses to obey the reasonable rules and regulations of the company, and the right of the passenger to resist the enforcement of such rules by force, ²⁸⁵ cannot exist at the same time. When such claims come in conflict with each other every reasonable man will agree that there are certain principles so obviously just that when applied to the facts of the particular case will work a fair solution of the question in controversy. The rule of the company that required the conductor to collect nineteen cents from the passenger who did not purchase a ticket is concededly a valid and reasonable regulation. It is sanctioned by the terms of an express statute and the duty of the conductor was to enforce it, and therefore it was the duty of the passenger to submit to it. A person who becomes a passenger in a public conveyance must subordinate his conduct to all rules that are reasonable and valid. Without such rules the corporation will not be able to perform the functions for which it was created. In the present case no one questions these propositions, but what is asserted in behalf of the plaintiff is that, behind these reasonable regulations, there was a fact which

rendered them inoperative or inapplicable to him, and that was the fact that the ticket agent was not in his office when the train started, and in consequence of his absence the plaintiff was unable to procure a ticket. But the conductor could not know what the fact was in that respect and was not bound to take the passenger's word for it, nor could he try and decide the question upon the word of the other passengers who procured tickets at the same station. The simple duty of the conductor is to execute and enforce all reasonable rules and that of the passenger is to obey them. If there is some fact or omission behind the rules not apparent upon the face of the transaction the passenger must resort to some other remedy for his grievance besides the use of force against the conductor, and if under such circumstances he invites a personal collision with the officer in charge of the train, resulting in his forcible expulsion, he puts himself in the wrong and cannot sue the company or the officer for assault and battery. In this case the plaintiff acted upon the principle that if he could ultimately prove that the ticket office was not open when the train started, and that he could not procure a ticket, ²⁸⁶ he had the right to refuse to pay the nineteen cents and to resist the conductor by force when he attempted to put him off. It would be difficult to show that such a principle has any support in reason, justice or authority. It is based upon the notion that the plaintiff had the right to be the judge in the controversy and to enforce what he deemed to be his rights with the strong arm, and, if worsted in the struggle, to sue the railroad for assault and battery. That, I think, is not the law. When a railroad company willfully exacts from a passenger more than the legal rate of fare, the latter may sue the company under the statute for the penalty of fifty dollars and the excess of fare, beside the damages that he may sustain in consequence of the wrongful act. But, as in this case, when the conductor demands only what he has the right to demand by the statute and rules of the company, the passenger is not at liberty to assert and maintain by force some right that he may claim which grows out of facts not within the knowledge of the conductor and which may render the rules inoperative or inapplicable. He is bound for the time being to yield to the reasonable practice and requirements of the officer in charge of the train, and to enforce any right that he may have against the company in some other and more proper way. By paying such a demand his cause of action is just as complete as if he forcibly resisted the demand and suffered himself to be

ejected. His ejection in such case will add nothing to his cause of action.

It would be an absurd and intolerable rule of law that would permit passengers upon a railroad to resist the officer in charge whenever a dispute arose in regard to some trivial matter wherein the passenger had a real or fancied grievance. When the plaintiff was told that he must, under the rules, pay the nineteen cents or leave the car, it was his duty either to pay the extra four cents or leave and resort to the remedy which the law gave for the redress of his grievance. The conductor could not suspend the rule merely because he was told that the passenger could not procure a ticket before the train started, and when notified by the conductor that removal ²⁸⁷ from the train must follow his refusal to pay, he had notice of the rule and the consequence of his disobedience to it. When he waited for the application of force to remove him he did so in his own wrong. He virtually invited all the force necessary to remove him, and, since no more was applied than was necessary to effect the object, he cannot recover either against the conductor or the defendant in an action for assault and battery: *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419. No case has been cited that sustains the proposition contended for by the learned counsel for the plaintiff, and that is that the plaintiff had the right to resist the conductor by force, on the ground that he was unable to procure a ticket. There are cases where damages were recovered for ejecting a passenger from the train. Such was the case of *English v. Delaware etc. Canal Co.*, 66 N. Y. 456, 23 Am. Rep. 69, where it was found that the conductor used more force than was necessary, and the proof tended to show that the train was in motion at the time, and, therefore, the law of self-preservation justified the passenger in repelling any attempt to eject him which would endanger his life. The case of *New York etc. R. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. Rep. 356, justifies resistance in a case like this, only so far as may be sufficient to denote that the passenger gets off by compulsion and not voluntarily.

The cases in other jurisdictions are to the effect that in a case like this the passenger must submit to the inconvenience of either paying the fare demanded or ejection, and rely upon his remedy against the company for the negligence or mistake of the ticket agent. The conductor cannot decide from the statement of the passenger, or his neighbors, what the facts are which may affect the operation of the rules. This would require

more time than the conductor can find in the proper discharge of his duties, and would expose the company to numerous and constant frauds: *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Shelton v. Lake Shore etc. Ry. Co.*, 29 Ohio St. 214; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711; *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499; *Poulin* ²⁸⁸ *v. Canadian Pac. Ry. Co.*, 52 Fed. 197; *Hall v. Memphis etc. R. R. Co.*, 15 Fed. 57; *Wiggins v. King*, 91 Hun, 343, 36 N. Y. Supp. 768.

The question always is in controversies of this character whether it is the conductor or the passenger that is in the wrong. If in this case it be the conductor, it must be because he should have disregarded the rules of the company upon the faith of the statement of the passenger and his neighbors that the ticket agent was absent from the office. On the other hand, it must be that the passenger, finding that the ticket agent, at a rural station where few tickets are sold, stood at the window ready to hand out tickets for only fifty instead of sixty minutes, was justified in starting a dispute with the conductor which involved only four cents more than he offered to pay, resulting in a personal collision or trial of strength and force and ending in his expulsion from the train. It seems to me that when a passenger defies the authority of the officer in charge, upon such grounds and under such circumstances, he must be held to have deliberately invited and procured the assault of which he complains. In the interests of peace and good order the law imposed upon the passenger the duty of obedience, and hence he should have either paid the four cents or left the car under protest, and then resorted to those peaceful remedies which the law provides in cases of wrongful or oppressive acts on the part of the railroad.

The law imposes upon the individual the duty of obedience, under all circumstances, to lawful authority, and if, underlying the authority, there may be a question of fact which renders the exercise of it unlawful, it is not for the party himself to decide that question and resort to violence or forcible resistance. The remedy is to appeal to the regular tribunals for the redress of any wrong or injury that he may have sustained in consequence of his enforced obedience to the regulation which he claims was not, for some reason, applicable to him under the circumstances.

We have, of course, no reference here to cases where personal rights or privileges may be invaded without jurisdiction or

warrant of law, but to cases that in some sense are analogous ²⁸⁹ to that of an officer who is called upon to execute process regular upon its face, though behind the process there may be some fact which would justify the decision that it was absolutely void. In such cases the individual affected must, for the time being, yield to the process and resort to proper proceedings to set it aside or to redress the injury.

For these reasons I think the judgment should be reversed and a new trial granted, costs to abide the event.

CULLEN, J. I vote for a reversal of the judgment appealed from. By section 1 of chapter 228 of the Laws of 1857, it was enacted that the defendant at every station on its road where it maintained a ticket office should keep the same open for the sale of tickets for at least one hour prior to the departure of each passenger train. By section 2 it was provided that if any person should, at any station where a ticket office was established and open, enter the cars without first having purchased a ticket, it should be lawful for the company to demand and receive five cents in addition to the prescribed rate of fare. The plaintiff entered the cars without a ticket at a station where a ticket office was established, but as we must assume, for the jury have so found, on an occasion when the same was not continuously kept open for the period of one hour before the departure of the train. He contends that, therefore, the demand for the extra five cents was excessive and that principle has been held by this court: *Chase v. New York Central R. R. Co.*, 26 N. Y. 523. Hence, had he paid that sum, he could under chapter 185 of the Laws of 1857, have recovered it back from the company, together with a penalty of fifty dollars for its exaction. I agree with Judge Bartlett that each party was bound to know and to determine for itself its legal rights, and also that if the plaintiff was within his legal rights he was justified in resisting any attempt to remove him from the cars. The question, as is said by Judge Bartlett, is not one of good taste (though I deny that good taste requires a passenger to submit to an imposition or unlawful exaction), ²⁹⁰ but of legal right. The question, however, remains whether the conductor was justified in requiring the plaintiff to pay the additional five cents, though as between the plaintiff and the company it was an unlawful exaction. The object of the statute, that passengers should be induced, under the penalty of an addi-

tional fare, to purchase tickets before entering the train, was in the interest of the public as well as in that of the company. There was a ticket office established at the station, and, therefore, the case of the plaintiff, *prima facie*, fell within the statutory provisions. The conductor did not know, and ordinarily could not know, whether the ticket office there had been kept open continuously for an hour before the departure of the train. He had a right to act on appearances. If he were obliged either to take the statement of every passenger that the office was for some part of the hour closed, or reject it at his peril, in case the statement should prove to be true, the provision requiring the purchase of tickets in advance of entering in the trains would entirely fail. In determining the lawfulness of the act of the conductor we must consider the common course of business of the country, and it seems to me fairly plain that the rule laid down in the courts below would be unreasonable and inconsistent with the ordinary and proper methods of conducting the transportation of passengers on railroads. If the conductor had attempted to exact as fare a sum in excess of that which by law he was, *prima facie*, entitled to demand, a very different question would be presented. In such a case I would agree with Judge Bartlett, that the passenger would be justified in resisting an attempt to eject him from the train, and that the good faith or ignorance of the conductor would not relieve the defendant from liability.

BARTLETT, J., dissenting. The material facts are undisputed. The plaintiff arrived at the depot of defendant at Oriskany on the morning of a certain day at 8:50 or 8:53 to take the 9:01 train for Utica. From the time of plaintiff's arrival until the departure of the train the ticket agent ²⁹¹ was absent from his office and no opportunity was afforded plaintiff to purchase a ticket.

The plaintiff took a seat in the train and when the conductor asked for his ticket stated to him the facts accounting for its nonproduction, being corroborated by two friends. The plaintiff thereupon tendered the regular fare to the point of destination, but the conductor insisted on collecting the five cents extra imposed by the statute as a penalty for failing to purchase a ticket at the station.

The plaintiff refused to pay the penalty and the conductor, against his protest and resistance, and with violence, ejected him

from the train at Whitesboro, a station between Oriskany and Utica. The plaintiff thereupon brought this action against the defendant to recover damages for assault and battery.

We have thus presented a not unusual situation, arising between the common carrier and its passenger, involving the single legal question, which party acted within legal right. If plaintiff failed to purchase a ticket before entering the train, opportunity having been afforded him to do so, he was liable to pay the statutory penalty of extra fare and refusing to do so, his ejection from the train was proper. On the other hand, if the defendant, by its act, rendered it impossible for the plaintiff to procure a ticket, his ejection from the train was wrongful and this action lies.

The argument on behalf of the defendant and appellant is, in brief, that the plaintiff should have paid the extra fare penalty, or left the train when requested to do so by the conductor, relying in either event upon his legal remedy; that the violence and indignity visited upon the plaintiff were of his own seeking and he cannot recover damages therefor.

This is not the law. The plaintiff and defendant were each bound in the emergency to determine the character of his or its legal rights, as it frequently happens that parties drifting into a legal controversy are driven to decide this question at their peril.

Much has been said as to the good taste of plaintiff in ²⁹² resisting so slight an invasion of his legal rights as was involved in the collection of the extra fare penalty.

The matter of good taste is wholly aside from the questions presented by this appeal; courts do not sit to enforce duties of imperfect obligation.

As to the extent the rights of the person were invaded in this case was a question very properly submitted to the jury and the plaintiff received at their hands a substantial verdict.

We agree with and adopt the prevailing opinion of the learned appellate division.

The judgment appealed from should be affirmed, with costs to the plaintiff.

Parker, C. J., Haight, J. (and Cullen, J., in memorandum), concur with O'Brien, J.; Martin and Vann, JJ., concur with Bartlett, J.

Judgment reversed, etc.

The Decision in the Principal Case is not supported by the weight of authority: Chicago etc. R. R. Co. v. Graham, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256, and note; monographic note to Commonwealth v. Power, 41 Am. Dec. 483, 484; Kansas City etc. R. R. Co. v. Foster, 134 Ala. 244, 32 South. 773, 92 Am. St. Rep. 25, and cases cited in the cross-reference note thereto. But see Kiley v. Chicago City Ry. Co., 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794.

PEOPLE v. MARTIN.

[175 N. Y. 315, 67 N. E. 589.]

STATUTES OF OTHER STATES may be Proved and Taken into Consideration in any proper case, subject to the provisions of domestic statutes and of the constitution, though they have no absolute or exclusive force beyond the boundaries of the state which enacted them. This principle is based upon common and international law originating in the comity which exists between civilized nations and states, to which, as between the states of the Union, is added the force of the federal constitution. (p. 631.)

LAWS OF SISTER STATES.—The law of a sister state is presumed to be valid, and when proved should be recognized, unless forbidden by the laws of our own state or by its public policy, to be deduced from its general course of legislation and from the settled adjudications of its highest court. (p. 631.)

PERJURY in Taking an Oath Required by the Laws of Another State.—Under a section of a penal code declaring that a person who swears that any affidavit or other writing by him subscribed is true on any occasion on which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of justice, and who, on such occasion, willfully and knowingly deposes falsely in any material matter, or states in his affidavit any material matter to be true which he knows to be false, is guilty of perjury, a person may be convicted of perjury if the oath taken by him was one permitted or required by the laws of another state. (p. 632.)

Indictment for perjury, to which the defendant demurred on various grounds, but principally on the ground that the facts stated did not constitute a crime. The demurrer was sustained in the trial court, but its action was reversed by an order of the appellate division of the supreme court of the first judicial department. The defendant appealed.

Frederic R. Kellogg and Franklin Bien, for the appellants.

William Travers Jerome, district attorney, and Howard S. Gans, for the respondent.

317 MARTIN, J. We have reached the conclusion that the judgment of the appellate division should be affirmed. We also concur in the able opinion of that court, and should rest our decision thereon but for the intimation therein that the words "required by law," contained in the statute defining the crime of perjury, are to be limited to affidavits and oaths required by the laws of this state. With that suggestion we do not agree. Hence, the only question we deem it necessary to consider is whether, under our statute, a person taking a false and corrupt oath in this state, required or permitted by the laws of a sister state, is guilty of the crime of perjury.

Section 96 of the Penal Code, so far as material to the question involved, declares: "A person who swears that any affidavit or other writing by him subscribed, is true, on any occasion in which an oath is required by law, or is necessary for the prosecution or **318** defense of a private right, or for the ends of public justice, or may lawfully be administered, and who on such occasion, willfully and knowingly deposes falsely, in any material matter, or states in his affidavit, any material matter to be true, which he knows to be false, is guilty of perjury." The indictment in this case charges that the defendants were respectively president and secretary of the Delaware Surety Company, a corporation duly organized and existing under the laws of that state; that by the general corporation law thereof the president, with the secretary or treasurer of every such corporation, is required, on the payment of the capital stock thereof, to make a certificate stating whether it has been paid in cash or by the purchase of property, and stating also the total amount of the capital stock paid in, which certificate must be signed and sworn to by the president and secretary or treasurer, and when so verified to be filed in the office of the Secretary of State; that on the 15th of May, 1901, at the city of New York, the defendants appeared before a notary public duly appointed, sworn and qualified in and for the county of New York and thereby duly authorized and empowered to administer oaths and take affidavits, and falsely, corruptly and knowingly made oath to a certificate that the entire capital stock of said surety company of one million dollars had been paid in cash, which they uttered and published as true, and the same was filed in the office of the Secretary of State of the state of Delaware.

The important question is whether the indictment shows that the officer before whom the affidavits of the defendants were

taken had jurisdiction to take their oaths thereto. That he had general authority to take affidavits there can be no doubt: Executive Law, sec. 85; Laws of Delaware, vol. 17, c. 212. But the more difficult question is whether the defendants' affidavits were taken and sworn to upon an occasion in which an oath was required by law, was necessary for the prosecution or defense of a private right, was for the ends of public justice, or was one in which oaths might be lawfully ³¹⁹ administered, within the spirit and meaning of section 96. The strenuous contention of the appellants is that the occasion mentioned in the statute must be one established, required or permitted by the laws of this state, and that the fact that such affidavits were required or permitted by the laws of a sister state, or they were necessary for the prosecution or defense of a private right or for the ends of public justice in such other state, does not constitute such an occasion as is contemplated by the statute. This seems a very narrow, technical and restricted construction of the broad language of that statute, one that can hardly be considered as within the purpose of the legislature, and should not be adopted unless required by that statute or some other controlling principle of law.

It is to be observed that the statute has essentially enlarged the rule which existed at common law in relation to the crime of perjury. The evident purpose of the legislature was to adopt a statute which would include and provide for the punishment of the act of taking a false and corrupt oath in this state whenever it was required or permitted by our laws or by the laws of any other state or commonwealth that might be regarded or treated as valid here. In other words, the purpose of this statute was to include within the definition of the crime of perjury the taking of any and every false and corrupt oath, unless it was purely voluntary and extrajudicial, in not being required, authorized or permitted by any law that might be enforced or carried into effect in our jurisdiction or elsewhere, or in not being necessary for the prosecution or defense of a private right, or for the ends of public justice wherever sought to be administered. That this was the broad purpose of that statute is not only plainly indicated by the language employed, but when we examine it in the light of the history of its adoption, in connection with the other provisions of the Penal Code relating to the subject of perjury, and construe it in accordance with the provisions of section 11 of that code, it becomes obvious that such was its intent and purpose.

320 While the statutes of one state which derive their force from the authority of the legislature that enacts them have no absolute or exclusive force or vigor beyond the boundaries of the state, but must be regarded as foreign laws, of which courts do not take judicial notice, still they may be proved and taken into consideration in proper cases, subject to the provisions of domestic statutes and of the constitution. This principle is based upon the common and international law originating in the comity which exists between civilized nations and states, to which, as between the states of the Union, is added the force of the federal constitution. It is true there has been some difference of opinion as to the effect of the provisions of the constitution which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," it being claimed, upon the one hand, that this provision is unlimited and requires each state to give full and absolute faith and credit to the acts of another state, and, on the other hand, that it imports no more than that such credit should be given by one state to the public acts of another, as by the rules of comity between the states is ordinarily conceded to the laws of another state. The latter view is sustained by the general weight of authority and especially by the decisions of the courts of this state. The observance or recognition of foreign or interstate law rests in comity and convenience, and in the aim of the law to adapt its remedies to the great ends of justice. This principle of comity is not, however, unlimited, as cases sometimes arise where the observance of such laws would be neither convenient nor answer the purpose of justice. Where foreign laws are in conflict with our own regulations, or our local policy, or do violence to our views of religion or public morals, or may do injustice to our citizens, they are not to be regarded in this state. Whatever force and obligation the law of one state have upon another depends upon the laws and regulations of the latter—that is to say, upon its own proper jurisprudence or polity, or upon its own express or tacit consent. **321** In harmony with the general law of comity obtaining among the states composing the Union, the presumption to be indulged in is that the law of a sister state is valid and when proved should be recognized, unless forbidden by the laws of our state, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court: *Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 352, 356. In the absence of any

positive rule, affirming, denying or restraining the operation of a foreign law, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interest. It is not the comity of the courts, but the comity of the state which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided. "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, the courts of justice have continually acted upon it, as a part of the voluntary law of nations": *Bank of Augusta v. Earle*, 13 Pet. 519.

It is under the principles of this general law of comity that one state is permitted to procure the testimony of witnesses in another, or to obtain their affidavits or acknowledgments to be used in the former: 1 *Greenleaf on Evidence*, sec. 320. Under it, contracts made in one state are enforced in another; rights of action given by the laws of one state are so enforced, even though of a tortious nature. These general rules of comity have been so often recognized and adopted by the courts of this state and under such a variety of circumstances, that reference to specific cases would be a work of supererogation: *Bank of Augusta v. Earle*, 13 Pet. 519, 589; *Paul v. Virginia*, 8 Wall. 168; *Christian Union v. Yount*, ³²² 101 U. S. 352, 356; *Parsons v. Lyman*, 20 N. Y. 103; *Bonati v. Welsch*, 24 N. Y. 157; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Debevoise v. New York etc. R. R. Co.*, 98 N. Y. 377, 50 Am. Rep. 683; *Matter of Waite*, 99 N. Y. 433, 2 N. E. 440; *Cross v. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. 125; *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545, 35 N. E. 425; *Stoddard v. Lum*, 159 N. Y. 265, 70 Am. St. Rep. 541, 53 N. E. 1108; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489.

We think it is clear that in adopting the statute relating to the crime of perjury the legislature intended to include not only any and every false and corrupt oath and affidavit taken or made in this state which is permitted or required by our statutes, but also to include any and every oath or affidavit so

taken or made, if permitted or required by the laws of any other state of the Union, whenever, under the general law of comity which exists between the states, they would be considered and given effect in this state. Hence, it is apparent that under this principle it will be the duty of the court before which this indictment is pending, on the trial and upon proof of the statute of Delaware requiring the affidavits made by the defendants, to take that statute into consideration and to give it full force and effect, as it is not repugnant to but in consonance with our laws. Any other conclusion would require an utter disregard of a firmly established principle of law, open an avenue of immunity for perjury, and thus seriously affect the proper administration of justice. It is a matter of common knowledge that many, if not most, of the corporations doing business in this state, in which our citizens are principal officers and stockholders, are incorporated under the laws of some other state. If such officers are to be exempt from the consequences of taking a false and corrupt oath in pursuance of the statute under which their corporation was organized, because taken in this state, the security given by the laws of its organization would be practically nullified and this state would become a paradise for perjurers.

It is to be borne in mind that there is no attempt in this case to enforce the criminal law of the state of Delaware, but to simply have accorded to the law of that state the force to ³²³ which it is entitled, and thereby establish the existence of an occasion where the oath taken by the defendants was required. The infraction of the criminal law, for which the defendants are indicted, was that of our own state which forbids the taking of a false and corrupt oath whenever lawfully permitted or required. The crime was committed in this state and affected the peace, dignity and good order of our own commonwealth, and the fact that it may have directly or indirectly affected a corporation which was organized under the state of Delaware in no way affects the question as to where the crime was actually committed.

We have confined our discussion to the one question suggested at the beginning of this opinion, and, as we are satisfied that the case was correctly decided by the learned appellate division, we regard any special consideration of the other questions, or any review of the authorities relied upon by that court, as unnecessary.

The judgment of the appellate division should be affirmed.

Bartlett, Haight, Vann, Cullen and Werner, JJ., concur.

O'Brien, J., dissents.

Judgment affirmed.

The Crime of Perjury is the subject of a monographic note to *State v. Shupe*, 85 Am. Dec. 488-501. See, also, the subsequent cases of *Wilson v. State*, 115 Ga. 206, 90 Am. St. Rep. 104, 41 S. E. 696; *Harkreader v. State* 35 Tex. Cr. Rep. 243, 60 Am. St. Rep. 40, 33 S. W. 117; *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572, 35 N. E. 951. Swearing to a false affidavit relative to an application thereafter to be made in a state court for naturalization under the laws of the United States is indictable in the state courts: *State v. Whittmore*, 50 N. H. 245, 9 Am. Rep. 196. See, also, *Exum v. State*, 90 Tenn. 501, 25 Am. St. Rep. 700, 17 S. W. 107.

The Statutes of Another State have, *ex proprio vigore*, no force or effect in this, and if enforced at all in its courts, such enforcement is dependent upon the adoption of the doctrine of comity. Each state must determine for itself whether it can enforce a foreign law without at the same time neglecting a duty which it owes to its own citizens, and if it cannot, such enforcement must be denied: *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419; *Ex parte Dickinson*, 29 S. C. 453, 13 Am. St. Rep. 749, 7 S. E. 593; *Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168. The comity of one state will enforce the law of another, when such enforcement neither violates its own laws nor infringes the rights of its own citizens: *Derringer v. Derringer*, 5 Houst. 416, 1 Am. St. Rep. 150; *North Pac. Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799. For the rule of comity as applied to contracts, see *Heason v. Eldridge*, 56 Ohio St. 87, 60 Am. St. Rep. 737, 46 N. E. 638; *Dearing v. McKinnon etc. Hardware Co.*, 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773.

CASES
IN THE
SUPREME COURT
OF
OHIO.

**STATE v. PITTSBURG, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY.**

[68 Ohio St. 9, 67 N. E. 93.]

INSURANCE is a contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils. (p. 639.)

INSURANCE, Life and Accident Insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injury by accident or death from any cause not excepted in the contract. (p. 639.)

INSURANCE, Life and Accident—Relief Department of a Railway does not Contract for.—The relief department of a railway corporation which admits none but its employes on their application, and which requires the applicant to constitute an agent of the corporation as his agent, to apply as a voluntary contribution to the relief fund, from his wages according to the rate of wages earned, as graded in the regulations for the purpose of securing the benefits provided for in such regulations for a member of the "relief fund," and "additional death benefit" stating his class, and name of the beneficiary in case of death, the applicant agreeing that the acceptance of benefits from the relief fund shall operate as a release of all claims for damages against the corporation arising from his injury or death, does not carry on the business of insurance. (p. 645.)

RAILWAY CORPORATIONS—Relief Department of—Ultra Vires.—The maintenance by a railway corporation of what is commonly known as a relief department for the benefit of its employes is not ultra vires, and it cannot, by a proceeding in quo warranto, be ousted from the further continuation of such maintenance. (p. 646.)

RAILWAYS—Public Policy—Relief Department.—The maintenance and management by a railway corporation of a relief department for the benefit of its employes is not against public policy. p. 647.)

Petition in quo warranto against the defendant railway corporation to oust it from further continuing the business of insurance by means of its relief department. It was agreed by the parties that the pamphlet designated as "Exhibit 'A'" contains a true statement of the organization, regulations, and mode of conducting business of the relief department; that it had not been engaged in the business of conducting a life and accident insurance, unless the business set out in such pamphlet is such insurance; that the defendant, since August, 1890, has operated more than two thousand three hundred miles of railway, extending from Pittsburg through the state of Ohio to Cincinnati, Chicago, Indianapolis, and Louisville, with many branch lines; that sixty-five per cent of its employés were members of the relief department in 1901. Among the regulations of the relief department shown by "Exhibit 'A'" were the following sections:

"1. The 'Voluntary relief department' is a department of the service of the several railroad companies, respectively, associated as set forth in the agreement to which these regulations are attached, in the executive charge of a superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the general manager.

"2. In these regulations, unless otherwise indicated, the titles 'company' and 'general manager' will be understood as meaning the Pennsylvania Company, and the general manager of that company.

"3. The object of this department is the establishment and management of a fund to be known as 'the relief fund,' for the payment of definite amounts to employés contributing to the fund, who, under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the applications of such employés.

"4. The relief fund, from which the proposed benefits are to be paid, will be formed by voluntary contributions from employés; appropriations, when necessary to make up any deficit, by the several companies respectively, and income or profit derived from investments of the moneys of the fund, and such gifts or legacies as may be made for the use of the fund.

"5. The associated companies under the stipulations of the agreement between themselves hereinbefore set forth, will take general charge of the department, guarantee the fulfillment of the obligations assumed by them respectively, in conformity with

the regulations from time to time established, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof. The company will take charge of the funds and be responsible for their safekeeping."

"10. The moneys received for the relief fund shall be held by the company in trust for the relief department. The advisory committee shall, subject to the approval of the board of directors of the company, direct the investment, and any changes therein, of money which is not required to be kept on hand for current use.

"Such investments shall be in the name of the company, 'in trust for the relief department.'"

"17. No employé will be required to become a member of the relief fund."

By section 6 it was provided that an advisory board, consisting of seven members, were to be elected, three by the board of directors of the Pennsylvania company, three by the defendant, and the other by the contributing members of the six or more constituent corporations composing the association.

The circuit court found for the defendant, and error was prosecuted to this court by the state.

J. M. Sheets, attorney general, J. E. Todd, assistant attorney general, and Smith W. Bennett, for the plaintiff in error.

Charles E. Burr and T. M. Livesay, for the defendant in error.

27 PRICE, J. We assume that the relator commenced the action in the circuit court against the defendant railway company under favor of section 6761 of the Revised Statutes, which is: "A like action (quo warranto) may be brought against a corporation: 1. When it has offended against a provision of an act for its creation or renewal, or an act altering or amending such acts; 2. When it has forfeited its privileges and franchises by nonuser; 3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises; 4. When it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege or right in the contravention of law."

Inasmuch as neither "the voluntary relief department," so called in the statement of the case, or its members, are parties to the suit, it would seem that the right to the remedy is not

under clause 3 of section 6760, but under clause 4 of section 6761, just quoted. And the prayer of the petition is: "That the defendant be ousted from further continuing said business of insurance by means of its said relief department or in any other manner whatever, ²⁸ and asks such other relief as the nature of the case may require." So, it is the complaint against the railway company, that under its charter and franchise as a railway company, it is conducting an insurance business in contravention of law, from which it should be ousted.

The answer denies that the defendant company transacts an insurance business, and in the circuit court certain facts were agreed upon in the trial and submission of the issue, some of which appear in the statement of the case. But there are some additional facts contained in the agreement which are necessary to be noticed in the determination of the important controversy, for it is not contended that the defendant openly, and in the usual manner, conducts insurance, and holds itself out to the public as an insurance company, and clearly such is not the fact in the case before us.

It is claimed by the relator, however, that the business done under the name of "the voluntary relief department" and in the manner and by the means employed, amounts in substance to an insurance business, and which exceeds the charter powers of the company. A proper determination of this question necessarily requires of us something more than a casual examination of the plans, structure and operation of the machinery by which the business in question is advanced and carried forward.

It no doubt is true that the organization of the so-called relief department was in the first instance projected by the defendant and other railway companies, under the control and management of the Pennsylvania Company, and perhaps the plan may have emanated from the latter company, but this is not important in ²⁹ this case, for the record discloses that the defendant, having a relief department such as is now under criticism, in November, 1890, by written contract, with a number of other railway companies who had leased their respective lines to the Pennsylvania Company, associated themselves in the administration of their respective relief departments, and they are denominated "The Pennsylvania Lines West of Pittsburgh."

They adopted certain regulations, and it is recited that one of the objects of the association is to "secure uniformity and economy"; that to accomplish this they "associated themselves" for the purpose of a joint administration and regulation of said respective relief departments under one common organization

to be known as "The Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh."

It further appears that prior to November, 1890, the Pennsylvania Company and the defendant company had "each respectively established a relief department for the benefit of its service and employés," and any other companies owning lines west of Pittsburgh which were being operated by the Pennsylvania Company, and which had adopted or would adopt similar relief departments, might associate with the former companies for the joint administration of the relief departments.

This brief history explains the character and form of the application for membership which is found in the record, and may give some color to the other features of the case. But the defendant, as did each of the other companies so associated, no doubt, continued its own separate relief department, with a subordinate or separate advisory board, partly composed of men selected by the contributing members,³⁰ and partly of men selected by the boards of directors of the constituent companies.

With this understanding of the general outlines of the origin, purpose and character of the relief department connected with the defendant, is it guilty of conducting an insurance business in contravention of law? This question suggests another: What is insurance business?

Various definitions have been given in brief of counsel, but we are content with the summary given in Bouvier's Law Dictionary (Rawle's Revision), 1068: "A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils." In another form, on the same page, it is said: "An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed."

Life and accident insurance is a contract whereby one party for a stipulated consideration agrees to indemnify another against injuries by accident, or death from any cause not excepted in the contract.

In the parlance of the business of insurance, ordinarily the contract is called a policy; the consideration paid, the premium; and the events insured against are called "risks and perils." In case of injury or destruction of the property insured, or injury by accident, or liability for death, the liability is called a loss. Policies of this character may be preceded by an application for the same.

In the relief department practice under review, an application is made the basis for membership, and ³¹ the applicant must be an employé of the company to which the department is attached. It is required to be addressed as follows: "Pennsylvania lines west of Pittsburgh, voluntary relief department. Application for membership in the relief fund. To the superintendent of the relief department." The applicant then states his name and residence, and the name of the company with which he is employed, the nature of the service engaged in, and that he has knowledge of and will be bound by the regulations of the relief department; and he constitutes the proper agent of the railway company his agent to apply as a "voluntary contribution" to the relief fund, from his wages according to the rate of wages earned as graded in the regulations, for the purpose of securing the benefits provided for in the regulations for a member of the "relief fund," and "additional death benefit," stating his class, and name of the beneficiary in case of death.

The application contains the following stipulation, which will be discussed later in the opinion: "And I agree that the acceptance of benefits from the relief fund for injury or death shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance." There are other statements in the application not material to our inquiry, and a certificate is issued in pursuance of the terms of such application, if it be approved.

³² Section 31 of the regulations provides that: "The word 'contribution,' wherever used in the regulations, or in the organization adopted in connection therewith, shall be held and construed to refer to such designated portion of the wages payable to an employé as he agrees to receive in the form of a right to benefits, in and through the relief fund; and the words 'contributors,' 'contributing employés,' and like words and phrases, are descriptive of employés so agreeing." It is stated in the third regulation that: "The object of this department is the establishment and management of a fund to be known as 'the relief fund,' for the payment of definite amounts to employés contributing to the fund . . . when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the application of such

employés." And by regulation 4 it is said; "This fund is formed by voluntary contributions from employés; appropriations by the railroad company when necessary to make up a deficit, etc." In regulation 10 it is provided that: "The money received from the 'relief fund' shall be held by the company in trust for the relief department." Investments made of the fund, if any, shall be in the name of the company "in trust for the relief department."

The railway company is the depository of the fund so raised and is responsible for its management and safekeeping, and agrees to make good any deficit in the fund which becomes necessary to meet the proper demands on the relief department. This management is by the general manager of the company, and the advisory board, the latter being composed of persons mutually selected by members of the fund and ³³ the companies. Moreover, the railway company defrays all the expenses of the management, and the emergency services of the surgeons are rendered free by the company surgeons. Not a dollar of the fund ever belongs to the railway company, and it primarily is made up of a certain part of the wages of the employé retained for that purpose by his direction. The concern has no capital stock. The doors to membership in this fund are not open to the general public. While an employé is not required to become a member, none but employés can do so. While it is true that the railroad company is the depository of the fund, and stands good for its safekeeping and proper disbursement, it is after all but the custodian of a certain portion of wages, which the employé directs shall be retained to produce the benefit fund, from which he may draw in times of sickness or other disablement.

Is this an insurance business? It is not held out to be such. The objects stated in the organization and regulations are clearly otherwise. Neither the railway company nor its relief department advertises for, or in any other way solicits, patronage. The members of the fund are volunteers. The business transacted, while in part done by an officer of the company, aided by representatives of the members, is not mingled with the business and accounts of the railway company. It has no offices set apart for an insurance business, and has no agents to promote its interests. It does not undertake to insure or indemnify against either sickness, accident, or death. Such is not the language or spirit of the relation between the member and the fund. On the contrary, in case of sickness or injury,

the members may draw from ³⁴ the relief fund what they mutually have created from a portion of their wages retained for that purpose, and the payment of the benefit is not the payment of a loss on a risk named in a policy or other instrument of insurance.

This differs from an insurance business as commonly, and we might say universally, conducted. It is organized on an insurance basis; advertised as such. It needs and uses agents to represent it, and it solicits from the general public. It has offices and current expenses, etc., and to protect the public, insurance laws have been enacted requiring publicity of its resources and methods of business, and in most cases periodical sworn statements of the condition and extent of the business being transacted. All this to prevent imposition upon the public, which might be misled by the representations of agents, or by published inducements for patronage. Another marked distinction between the relief department and insurance business is, that there is no profit to the railway company, and no profit in the business or commercial sense to the members of the fund, except such increase of the fund as may arise by way of interest on its investment, in case of a surplus. Those who organize or embark in insurance business have profit in view as a recompense for the industry, ability and capital invested, and it would be a strange insurance business that would omit this great incentive from its plans and purposes.

But it is said there is a resulting benefit to the railway company, from the maintenance of the relief department, in the nature of profit, and that it consists in the stipulation in the application for membership that the acceptance of benefits under the certificate of membership releases ³⁵ the company from all liability to him or his beneficiary for damages on account of injury or death. We have hereinbefore quoted that stipulation, but it must be observed that the member or beneficiary, after the injury and all its facts and circumstances are fully known, has the right to elect as between the acceptance of benefits and a claim against the company for damages. He is not compelled to accept benefits or nothing; and he waives no right to proceed against the company until he has accepted the benefits provided for him. It is true, that very many may accept the benefits and release the company, but it is not every injury to the employé, and not every case of his death from injury in the service, that furnishes a good cause of action against the company. Whatever benefit may accrue to the

company by the acceptance of benefits cannot be called "profit," because it is but a remote or probable sequence to the membership of the employé. Indeed, it seems that the liability of the railway company is enlarged by the relief department. It vouches for the payment of benefits if accepted, and independent of any right of action against it, and leaves open the option to accept benefits or decline them and claim damages of the railway company.

If it is said that the company expects to realize from the relief department by reason of more loyal service and increased confidence of the employé in his employer, we may reply that loyalty of service and reasonable confidence are due the employer so long as he faithfully and honorably performs his contract and discharges all his duties to his employé. It seems difficult to figure out of the relation that exists after and on account of this membership the idea of profit to the company. If it breeds goodwill and contentment, ³⁶ the same is laudable, and we see nothing in the rules of the department that takes away or jeopardizes a single legal right of the employé. If sick, he may receive the aid. If injured in the service, even through his own negligence, or in a service the risks and perils of which he assumed, he is entitled to his share of the fund. And if his injury is the fault of the company, he can elect to take the benefits provided or sue at law.

In one form or another the controversy we are dealing with has been before other courts of final resort, and the almost, if not altogether, unanimous holding is, that managing and conducting such a relief department is not insurance business, but, on the contrary, a beneficial provision merely for employés, which the railway company might aid in promoting. We will note but a few of such cases.

Commonwealth v. Equitable Beneficial Assn., 137 Pa. St. 412, 18 Atl. 1112, is a case where there was a proceeding in quo warranto to require the defendant to show by what authority it claimed the right to make contracts of insurance and issue policies of insurance. The defendant answered the writ and denied making contracts of insurance, or issuing policies of insurance as alleged by the attorney general. In the syllabus the supreme court of Pennsylvania say: "1. A contract of insurance is purely a business adventure, not founded on any philanthropic or charitable privilege; and the design and purpose of an insurance company, and the dominant and characteristic feature of its contract, is the granting of an indemnity,

or security against loss, for a stipulated consideration. 2. But the design of what are known as benevolent societies, which are purely of a philanthropic ³⁷ or benevolent character, is, not to indemnify or secure against loss, but from the contributions of members to accumulate a fund to be used in their own aid or relief, in the misfortunes of sickness, injury or death."

At the risk of being prolix we are tempted to adopt here a paragraph from the opinion of Justice Clark, on page 419 (137 Pa. St., page 1113, 18 Atl.) of that case: "To grant indemnity or security against loss for a consideration is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance. What is known as a beneficial association, however, has a wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or secure against loss; its design is to accumulate a fund from the contributions of its members, . . . to be used in their own aid and relief in the misfortunes of sickness, injury or death. . . . The motives of the members may be, to some extent, selfish, but the principle upon which they rest is founded in the considerations intended. Their benefits, by the rule of their organization, are payable to their own unfortunate, out of funds which the members have themselves contributed for the purpose, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death. Such societies have no capital stock. They yield no profit, and their contracts, although beneficial and protective, altogether exclude the idea of insurance or of indemnity, or of security against loss."

³⁸ The above case was quoted from with approval in *Northwestern Masonic Aid Assn. of Chicago v. Jones*, 154 Pa. St. 99, 35 Am. St. Rep. 810, 26 Atl. 253. More directly in point is *Beck v. Pennsylvania Co.*, 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908. The facts in that case show that it involved a relief department, organized precisely like the one under consideration. The opinion was by a unanimous court, and it held that the transaction was not an insurance contract within the meaning of insurance law. It also held that it was neither ultra vires, or against public policy.

On page 241 of the opinion, Magie, chief justice, speaking of the relief department, says: "It is limited to such of the employés of the company as voluntarily apply for admission to

the fund and are admitted. They agree with each other and the company to contribute a portion of their wages to create a fund out of which they shall be paid certain sums in case of sickness or injury, and out of which, in case of death, certain sums shall be paid to the beneficiaries or next of kin. The sum so paid may save from want, but does not increase the estate of the employé. . . . I can perceive no reason why the establishment of such a fund and the agreement of those who contribute to it as to its distribution can be held to fall within the regulations of the insurance laws. Such association creates its own fund by voluntary action, and distributes it by an agreed upon plan, and the contract between them is not of insurance but of beneficial relief. As they have neither sought nor obtained corporate powers for their purpose, they are not amenable to prohibitions against the use of corporate powers for that purpose, if any such exists."

³⁹ The question was also before the supreme court of Iowa in two different cases. In *Donald v. Chicago etc. R. R. Co.*, 93 Iowa, 284, 61 N. W. 971, the character of a similar relief department was under review. One proposition of the syllabus is: "An association organized by a railroad company for its employés, which agrees to pay stated sums to members or their beneficiaries in case a member is killed or injured in the employment, the company paying operating expenses and making good deficiencies after assessment, is not an insurance company, but a beneficiary society." It was also decided in that case that the contract involved was not against public policy, and the reasons for the conclusion, we think, are unassailable.

Again, in *Maine v. Chicago etc. R. R. Co.*, 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315, the same holding was made. It is there decided also that a railroad company has implied power to make such contract.

The foregoing cases cite many others to support them, but we have no further room for their consideration. The cases form a uniform current of judicial opinion. We have not been cited to a single case holding a contrary view, and our research has not been rewarded with one. We think the tide of judicial opinion is irresistible.

There is another reflection in this case. We have, to a reasonable extent, examined our statutes upon the subject of insurance and insurance companies. They provide carefully for their charter and organization, and for the deposit of the required amount of money or securities before proceeding to busi-

ness. Certain sworn statements and annual reports are to be filed with the insurance department, etc.; but we find no section that makes a call upon such an association as this relief department. The legislature thus far ⁴⁰ has not recognized its business as that of insurance. On the contrary, there seems to be an express exception in favor of such associations.

Section 3631a of the Revised Statutes provides: "This act (viz., sections 3630a to 3631) shall not apply to any association of religious or secret societies, or to any class of mechanics, express, telegraph or railroad employés, or ex-Union soldiers, formed for the mutual benefit of the members thereof, and their families or blood relatives, exclusively, or for purely charitable purposes"; and then provides how such associations may incorporate. See, also sections 3631-23 of the Revised Statutes, where there is an exception of similar associations from the operation of insurance laws. We think it apparent from these and other sections that it has been the legislative intent to permit some of the plain and useful things of everyday life to be attended to without the wearing of a corporate charter.

It is also urged in argument for the relator that the acts of the railroad company in promoting and managing the relief department are ultra vires, and therefore the defendant should be ousted from performing them. Some of the cases we have cited deny this proposition, and there are many others of the same tenor and import. For the purposes of this branch of the case, we need seek no further than a decision of this court, in *Gas etc. Co. v. Dairy Co.*, 60 Ohio St. 96, 53 N. E. 711. The first section of the syllabus expressed the opinion of the entire court, and it declares: "The implied powers which a corporation has in order to carry into effect those expressly granted and accomplish the purpose of its creation are not limited to such as are indispensable for these purposes, but ⁴¹ comprise all that are necessary in the sense of appropriate, convenient and suitable, including the right of reasonable choice of means to be employed." The second section of the syllabus lacked the support of but one member of the court, and it declares: "Acts of a corporation which, if standing alone or engaged in as a business, would be beyond its implied powers, are not necessarily ultra vires when they are incidental to, or form part of, an entire transaction that in its general scope is within the corporate purpose. The validity of such a transaction is to be deter-

mined from its general character considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others."

The most of the work of an employé of a railroad company is hazardous, and frequent injuries are sustained requiring surgical and medical attention. The company has its surgeons along its lines to respond in case of injury, and the more efficient the organization of this beneficent branch of the service, the better for both the master and servant. And yet the company should not be charged with conducting a medical or surgical school. If it should establish hospitals for its injured employés and equip them with everything conducing to comfort and speedy recovery, including surgical attention, its acts should not be regarded as ultra vires, in that it conducts hospitals.

It may, for the purposes of careful and successful management of its business as a railroad, establish telegraph and telephone facilities and install a proper number of competent operators, and yet it may not be charged with carrying on a telegraph and telephone business. It may establish hotels and eating-rooms along its lines and not be in the hotel business.⁴² All these things are incidental to the main occupation and are within the implied powers conferred.

Again, it is said that the scheme adopted and the conditions of membership meet the condemnation of public policy. Some of the cases already cited consider this question also. There are very many others, a few of which we cite: *Otis v. Pennsylvania Co.*, 71 Fed. 136; *Pittsburgh etc. Ry. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290; *Johnson v. Philadelphia etc. R. R. Co.*, 163 Pa. St. 127, 29 Atl. 854; *Beck v. Pennsylvania Co.*, 63 N. J. L. 232, 67 Am. St. Rep. 211, 43 Atl. 908; *Hamilton v. St. Louis etc. R. R. Co.*, 118 Fed. 92. These cases cite many others to the same effect, and as on the first branch of this case, the authorities present a solid front.

We need not pursue this discussion further than to cite a leading case decided by this court: *Pittsburg etc. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641. That case involved the same relief department developed in the present inquiry, and the certificate of membership is precisely like the form now in use by the defendant, and this court held expressly that the contract between the members and the company is not contrary to public policy. We are still satisfied with that decision, and believe it to be entirely sound.

The grounds for ousting the defendant have not been sustained. The circuit court correctly so held and its judgment is affirmed.

Burket, C. J., Spear, Davis, Shauck and Crew, JJ., concur.

The Contract of an Employé with a corporation in respect to its relief department has been held valid, and not opposed to public policy, nor lacking in mutuality or consideration, nor ultra vires, nor an insurance contract: *Deck v. Pennsylvania etc. R. R. Co.*, 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Chicago etc. R. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; *Ringle v. Pennsylvania R. R. Co.*, 164 Pa. St. 529, 44 Am. St. Rep. 628, 30 Atl. 492. But see *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582.

IN RE ESTATE OF CRAWFORD.

[68 Ohio St. 58, 67 N. E. 156.]

ADMINISTRATION—**Extraterritorial Effect of Grants of.—**Every Grant of Letters Testamentary or of Administration is confined in its operation to the limits of the territory of the government which grants it, and does not de jure extend to other countries. Whatever operation is allowed to it beyond that territory is a mere matter of courtesy which any state or nation is at liberty to yield or withhold, according to its own policy and procedure. (pp. 653, 654.)

FOREIGN ADMINISTRATORS.—An Administrator, Though with the Will Annexed, cannot intermeddle with the effects of the testator in another state unless permitted to do so by its laws. (p. 654.)

EXECUTORS cannot, as Such, have any Authority Over Property Situated in Another State so long as it is controlled by a special administrator appointed in that state, and it is of no consequence that he is one of the persons named as executors. (p. 655.)

CONFLICT OF LAWS—Property in Another State Devised to Executors in Trust.—Though a testator devises his property to his executors named in his will, to be held in trust as therein specified, this does not authorize them to administer the trust as to property situate in another state in any other way or manner than subject to its laws. (p. 655.)

RES JUDICATA.—An Adjudication of a Court of Another State as to the Estate of a Decedent there Situate cannot be questioned in the state wherein he died and where his will was admitted to probate and executors appointed, unless it is shown that the adjudication was without jurisdiction. (p. 655.)

JURISDICTION—Waiver of Right to Object to.—Where persons interested under a will appear in a probate court of another state, and, after a decision there against them, appeal to a higher court, where the cause is tried on its merits without any objection

to the jurisdiction, they are bound by the decision, and must be regarded as waiving all objections to the jurisdiction, if any existed. (p. 656.)

JURISDICTION—Attack on an Appeal from a Court Which did not have Jurisdiction.—That a cause gets into a court by appeal from a court which did not have jurisdiction over it, rather than by original pleading and process, is but an irregularity not affecting any substantial right, and one which may be and is waived by the parties proceeding to trial on the merits without objecting to the right of the court to proceed. (pp. 656, 657.)

RES JUDICATA—Order of Court of a Sister State.—The Settlement of Accounts of a Special Administrator and as Executor made by a court of another state having jurisdiction, and affirmed by the supreme court of that state, is conclusive upon the courts of this state as a final adjudication of those accounts. (p. 657.)

Exception to the account of William R. Stafford, executor of Mabel Crawford, deceased, filed in the probate court of Lucas county. The testatrix was a resident of Toledo, Ohio, and left a will which was admitted to probate, and letters testamentary were issued to William R. Stafford and Clay Stafford as executors. The ninth and tenth clauses of the will were as follows:

“Item 9. I hereby nominate and appoint said William R. Stafford and Clay Crawford executors of this my last will and testament; and I hereby give, devise and bequeath all my real and personal property of every kind and nature (save and except as is specified in item two herein), to said above-named executors, in trust for the execution of my will, with power and full authority to sell and dispose of the same, at public or private sale at such times (within three (3) years after the date of my death), and upon such terms and in such parts as to them shall seem best, and I hereby authorize said executors or either of them, who shall qualify, to sell as above or lease or mortgage any part of my property, if in their opinion it is advisable so to do, and to execute and deliver any instruments or writings necessary or proper to carry into effect any powers granted in this will, and to sell and convey any or all my real estate in fee simple without being required to obtain any orders of court therefor, and with full power to settle, compromise, arbitrate or adjust any claim due either to or from my estate on such terms as they may deem best. I request that no bond be required of said executors or either of them.

“Item 10. After said executors have converted the property herein conveyed to them into money, and after they have paid the costs and expenses of the administration hereof and the debts as provided in item one (1) herein, and after they have

put at interest the full amount of the two funds specified in items six (6) and eight (8) herein, and after paying as provided in item seven (7) herein, then out of the entire balance remaining I desire the bequests mentioned in items three (3), four (4) and five (5) herein to be fully paid. If from any cause there be a deficiency, and there be not enough to pay in full each bequest in said last three items mentioned, then each bequest in said last three items shall bear its part of such deficiency in the proportion which each bequest bears to the total sum of all bequests specified in said items numbered three (3), four (4) and five (5) herein; but if, as I expect, there be a surplus, and the balance remaining shall be greater than is needed to pay the full amount of each bequest specified in said items 3, 4 and 5 herein, then after paying the full amount of each bequest in said items three, four and five herein, I give and bequeath all such surplus (intending to thereby dispose of all the balance of my property) to the parties named in bequests specified in items numbered three (3), four (4), five (5) and eight (8) herein. Such surplus to be divided between and added to each bequest specified in said last-mentioned four items, in the proportion which each bequest bears to the total sum of all bequests specified in said last-mentioned four items."

The testatrix owned a large amount of real property in Huron county, Michigan. A suit was commenced in Lucas county, Ohio, to contest the will, which remained pending until March 10, 1893, when judgment was entered affirming the validity of the will. In July, 1891, William R. Stafford was appointed a special administrator by the probate court of Huron county, Michigan, and in May, 1893, that court admitted the will to probate and appointed him executor. In August, 1896, he presented to the Michigan court his final account as special administrator, to which exceptions were filed by Clay Crawford, executor, who also represented the Protestant Orphans' Home and the Washington Street Congregational Church, both of Toledo, and both legatees under the will, which exceptions, among other matters, asserted that several of the items of the account were cognizable only by the probate court of Lucas county, Ohio. From the order and judgment of the probate court of Huron county an appeal was taken by exception to the circuit court of the same county. That court, after a trial, approved the accounts as stated by the probate court and discharged Stafford as special administrator from all liability concerning the estate.

In August, 1896, Stafford presented his final account as executor to the probate court of Huron county, to which Clay Crawford, as executor and residuary legatee, and as representing the Protestant Orphans' Home and the Washington Street Congregational Church, filed exceptions, urging that certain items were cognizable only in the probate court of Lucas county, Ohio. From an order entered in the probate court of Huron county, Stafford appealed to its circuit court, where the cause was tried on its merits in March, 1897, and the order of the probate court reversed, and the account allowed except as to one item. A writ of error was then prosecuted by Crawford to the supreme court of Michigan, which, in October, 1898, affirmed the order of the circuit court.

In November, 1896, Stafford filed in the probate court of Lucas county his first account as executor, purporting to exhibit his transactions as executor arising out of the part of the estate situate in Ohio. The hearing of this account was postponed owing to the pendency of the exceptions to his Michigan accounts. Exceptions to his account filed in Lucas county were interposed by the Protestant Orphans' Home. By these exceptions it sought to have the Ohio court review the items of the account relating to the Michigan assets and embraced in the accounts filed in that state. Stafford moved that these exceptions be stricken from the files, on the ground, among others, that the accounts had been fully heard, determined, and settled by the court in Michigan.

Pending the hearing, the probate court in Ohio ordered Stafford to file a complete account of all moneys received and paid out by him up to February 1, 1899. In response to this order, he filed only copies of his Michigan accounts. On February 4, 1899, a restatement of his account was filed in the probate court of Lucas county, accompanied with an affidavit setting up the facts respecting the settlement of his accounts in Michigan and the action of the courts of that state thereon, and claiming that, by reason of such action, all matters contained in his accounts as special administrator and also in his accounts as executor appointed by the probate court of Michigan had been fully and finally determined and adjudicated; that he had filed in the Ohio court, on or before January 11, 1899, certified copies of his Michigan accounts and also of the judgments of the courts of that state thereon. At the hearing, the court in Lucas county overruled the motion of Stafford to strike out the exceptions of the Protestant Orphans' Home and sustained all the exceptions

to Stafford's account, and restated and settled it, embracing therein most of the items contained in the Michigan accounts, and thus found an indebtedness existing against him of upward of twenty-two thousand dollars. Thereupon he appealed to the court of common pleas of Lucas county, wherein he interposed the same motion as in the probate court. The motion was sustained so far as the exceptions related to that portion of the estate situated in Michigan and which had been accounted for in the courts of that state. The Protestant Orphans' Home thereupon took a bill of exceptions. Later an order was entered permitting the American Missionary Society, the American Board of Commissioners for Foreign Missions, and the Washington Street Congregational Church of Toledo to contest all issues undetermined in the action and to institute proceedings in error founded on the bill of exceptions, and to do any acts in relation thereto which either could have done had such bill been taken, signed, and filed by them respectively. On further hearing, the exceptions of the Orphans' Home were overruled, except as to one item. The exceptors carried the cause to the circuit court of Lucas county, where, at the January term of 1901, the judgment of the court of common pleas was affirmed. The Orphans' Home, the Missionary Association, the Board of Commissioners for Foreign Missions, and the Congregational Church thereupon prosecuted error to obtain a reversal of the judgments in the circuit court and court of common pleas, and an affirmance of the judgment of the probate court.

Rhoades & Rhoades and George W. Radford, for the plaintiffs in error.

Charles G. Wilson and Elbridge F. Bacon, for the defendant in error.

⁸⁰ SPEAR, J. The elaborate and very able arguments of counsel, both oral and by brief, invite to an extended discussion of numerous questions germane to ⁸¹ the issues covered by the record; but, as we view the case, many of the propositions become unimportant, and the vital questions which are determinative of the rights of the parties in this court may be disposed of in a comparatively limited space.

Briefly stated, the claim of the plaintiffs in error, as put by their counsel, is that: Under the terms of item 9 of the will the title to all the real estate (wherever situated) was devised to W. R. Stafford and Clay Crawford, as devisees in trust; that:

upon the probate of the will in Ohio and the acceptance of the trust by Stafford and Crawford the fee simple title to all real estate in Michigan and elsewhere vested in them as such devisees in trust, and the probate court of Lucas county, Ohio, then acquired jurisdiction of such trust and of the trustees; that the probate courts in Michigan have no jurisdiction over testamentary trusts or trustees, chancery having exclusive jurisdiction thereof; that the exceptions which were disallowed covered items amounting to several thousand dollars of moneys received from the sales of land, and the products thereof, and expenditures for the cultivation of the land, all which items form part of the trustees' accounts over which a court of chancery has jurisdiction. Hence the confirmation of Stafford's accounts by the probate court of Huron county, Michigan, as to these trustee items was without jurisdiction and void.

That the title to the land is derived from the will and that it vested in Stafford and Crawford as devisees in trust upon their acceptance and qualification as such, and that the probate court of Lucas acquired jurisdiction as to matters relating to the trust which should arise out of assets in Ohio, need not be disputed, but the assumption that that court ⁸² acquired jurisdiction over the conduct of the executors and trustees with respect to lands lying outside the limits of the state of Ohio does not follow. The claim is directly in conflict with the general rule, held in *Vaughan v. Northup*, 15 Pet. 1, to be: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, de jure, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of courtesy which every nation is at liberty to yield or to withhold according to its own policy and pleasure, with reference to its own institutions, and the interests of its own citizens." The same doctrine is announced by Justice Story in his *Conflict of Laws*, where, at section 514, it is stated: "It is exceedingly clear that the probate grant of letters testamentary or of letters of administration in one country give authority to collect the assets of the testator or intestate only in that country, and do not extend to the collection of assets in foreign countries; for that would be to assume an extraterritorial jurisdiction or authority, and to usurp the functions of the foreign local tribunals in that matter. It is no

answer to say that the effects of the testator or intestate are assets wherever they are situated, whether at home or abroad. . . . The question is not whether they are assets or not, but who is clothed with authority to administer them; and this must be decided by the local jurisdiction where they are situated, for the original administration has no extraterritorial operation." Again, ⁸³ speaking of ancillary administration, the author (section 513) observes: "Still, however, the new administration is made subservient to the rights of the creditors, legatees and distributees who are resident within the country wherein it is granted; and the residuum is transmissible to the foreign country only when a final account has been settled in a proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law in the application and distribution of the assets found there." This is recognized law in Michigan (*Reynolds v. McMullen*, 55 Mich. 568, 54 Am. Rep. 386, 22 N. W. 41; *McIntire v. Conrad*, 93 Mich. 526, 53 N. W. 829), in New York (*Parsons v. Lyman*, 20 N. Y. 103), and seems to be the uniform doctrine of all the courts. It has been regarded as the law of Ohio from early times. In *Wills v. Cowper*, 2 Ohio, 124, *Sherman, J.*, expresses it thus: "But the very appointment, as well as the power of an administrator over the estate of a decedent, emanates from the laws of the country where he receives his appointment. The extent of his authority and the manner in which it shall be exercised depend upon legislative enactments, and is confined to the jurisdiction of the country granting the administration: *Doe v. McFarland*, 9 Cranch, 151. An administrator, as such, cannot intermeddle with the effects of his intestate in another state, unless permitted to do so by the laws of that state; otherwise it would be in the power of one state to regulate the distribution of property situated in another. And the rule is the same whether the administration be general or with the will annexed. In either case the authority of the administrator emanates from the law, and cannot extend beyond the jurisdiction of the power conferring the authority; and the will being annexed to the grant of administration, does ⁸⁴ not not change the tenure by which the administrator holds his office."

It follows from this that the executors could have only such authority over the Michigan lands as is given by the laws of that state, and they provide for the appointment by the probate court of a special administrator where the validity of a will

(as in this case) is contested, and of course such administrator would have to account to the court which appointed him: *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182; 3 Miller's Compiled Laws of Michigan, pars. 9326, 9345-9347. It is plain that the executors named in the will could have, and did have, as such, no authority over the Michigan property so long as it was controlled by the special administrator, and it is not of consequence that the administrator was one of the persons named as executor. His authority came from the probate court of Huron county, and to that court alone was he required to account. And when the will was probated in Huron county, and letters testamentary issued, it became, by the statute of that state, the duty of the special administrator to turn over to the executor the property in his hands, which was done, and the executor then succeeded to all the powers of the special administrator, and was subjected to the same duty to administer according to the laws of Michigan, and to account to the probate court for his conduct: 3 Miller's Compiled Laws of Michigan, pars. 9330, 9345. All these steps seem to have been taken strictly in accordance with the laws of that state, and it is clear, from these statutory provisions, that the state of Michigan has not, by comity or otherwise, extended the right of an Ohio administrator or executor to administer the trust as to property in Michigan in any other ⁸⁵ way or manner than subject to the laws of Michigan.

It results that the adjudication of the courts of Michigan as to this estate is conclusive upon the plaintiffs in error appearing in those courts, and settles the controversy here against them, unless it is shown that such adjudication was without jurisdiction. The proposition urged by counsel, it will be borne in mind, is that the accounts rendered by Stafford to the probate court of Huron county, Michigan, were accounts as trustee, and not as executor, and that that court was without jurisdiction to adjudicate them, such jurisdiction being lodged exclusively in the chancery courts. An ingenious argument is produced in support of this proposition, but we do not find it necessary to give the question serious consideration in view of the action of the parties subsequent to the judgment of the probate court. Recurrence to the record shows that Clay Crawford, in appearing as an exceptor in the probate court of Huron county, represented not only himself but specially two of the plaintiffs in error, viz., the Protestant Orphans' Home and the Washington Street Congregational Church. From the judgment of the

probate court respecting one of Stafford's accounts, Crawford, representing directly the other parties, as well as himself, appealed to the circuit court of that county, and as to the judgment respecting the other account, he, with his coexceptors, followed Stafford's appeal to that court, and there, as he had done in the probate court, took issue as to the justice and equity of the items of the accounts, and challenged the right of the probate court to take cognizance of the items thereof on the ground that they were only cognizable by the Lucas county probate court. In short, the cause was tried in the circuit ⁸⁶ court on its merits. It does not appear that any objection was made because of any lack of jurisdiction in the circuit court to hear and determine the issue, nor was there any objection respecting the way in which the controversy reached that court. Indeed, it seems to be conceded that the circuit court is a court of general jurisdiction, thus possessed of power to pass upon its own jurisdiction, having also chancery powers; and such we understand to be the fact: Miller's Compiled Laws of Michigan, par. 415. The parties, therefore, were in a court which, according to the theory of plaintiffs in error, was such a court as should have been resorted to in the first instance. In that court the parties joined issue and the cause went forward to final judgment. How can the parties who then entered their appearance at the trial and submitted their controversy be heard now to dispute the jurisdiction of that court? We think they cannot. That the cause got into that court by appeal from a court which had not jurisdiction of it (if that be the case), rather than by original pleadings and process, was after all but an irregularity not affecting any substantial right, and one which may be waived. The record shows that it was waived. It was in legal effect not different from the submission of an agreed case, practice familiar to us by virtue of section 5207 of the Revised Statutes, respecting any controversy of which the court would have jurisdiction if an action were brought, and which seems to be authorized by the law of Michigan: 3 Compiled Laws, par. 10414.

We hold the law to be that where parties voluntarily, and without objection, submit to a court having jurisdiction of the subject matter their controversy, and the cause proceeds therein regularly to ⁸⁷ trial and final judgment, they will be held to have waived their right to object to the jurisdiction of that court, even though the cause had been taken into it by an appeal

from an inferior court which had not jurisdiction of the subject matter. The cases of *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340, *Spier v. Corll*, 33 Ohio St. 236, *Scobey v. Gano*, 35 Ohio St. 550, and *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160, cited and relied upon by counsel, have no application to the facts of this case, but the principle involved more resembles *Hallam v. Jacks*, 11 Ohio St. 692, *Collins v. Davis*, 33 Ohio St. 567, *Andrews v. Youngstown*, 35 Ohio St. 218, *Kershaw v. Snowden*, 36 Ohio St. 181, and *Jones v. Booth*, 38 Ohio St. 405.

If the conclusion that the parties who appeared as exceptors in the circuit court of Huron county and now appear here as plaintiffs in error cannot question the jurisdiction of that court is well founded, equally are the other plaintiffs in error forbidden to question it. Having applied to be admitted as parties in the common pleas of Lucas county, as legatees under the will, and there having been properly held to belong to a class for whose benefit the action had been prosecuted, and having there adopted as their own the exceptions filed by the Protestant Orphans' Home, their rights as plaintiffs in error rest upon the same foundation, and are to be measured by the same rule that applies to the others who seek relief at the hands of this court.

It is suggested that the error case in the supreme court of Michigan was not heard on its merits, but was disposed of on the ground of a defect in the record. Nevertheless the judgment of the circuit court was affirmed, and the determination is equally conclusive as a final judgment.

⁸⁸ Having determined that the cause was heard and decided by a court of Michigan possessed of adequate jurisdiction to entertain and adjudicate it, and applying to the case the mandate of the constitution of the United States (article 4, section 1), that: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," we necessarily reach the further conclusion that the settlement of the accounts of Stafford as special administrator and as executor, made by the circuit court of Huron county, Michigan, and affirmed by the supreme court of that state, is conclusive upon the courts of Ohio as a final adjudication of those accounts, and that the judgment of the Lucas circuit court and of the common pleas holding this to be the law should be affirmed.

Burket, C. J., Davis, Shauck, Price and Crew, JJ., concur.

Letters of Administration have no Extraterritorial operation, and do not, as a matter of right, confer authority over personal assets found without the jurisdiction from which the grant is derived: *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80, 25 South. 229; *Succession of Gaines*, 46 La. Ann. 252, 49 Am. St. Rep. 324, 14 South. 602. The authority of a domiciliary administrator or executor does not extend to property in a foreign jurisdiction nor to doings of the executor or administrator there: See the monographic note to *Shinn's Estate*, 45 Am. St. Rep. 671, 672, on the powers and duties of executors and administrators as to property outside the state. For the relative powers and duties of ancillary and principal administrators, see the monographic note to *Goodall v. Marshall*, 35 Am. Dec. 483-490; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *Bealey v. Smith*, 158 Mo. 515, 81 Am. St. Rep. 317, 59 S. W. 984.

Foreign Decrees in Probate are discussed in the recent monographic note to *Tremblay v. Aetna Ins. Co.*, 94 Am. St. Rep. 557-559, on foreign judgments.

Jurisdiction of the subject matter of a suit cannot be conferred by consent, nor can the want thereof be waived: *Conant v. Deep Creek Irr. Co.*, 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188; *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 897, 43 S. E. 164. Compare *Sententia v. Ladew*, 140 N. Y. 463, 37 Am. St. Rep. 569, 35 N. E. 650.

OVERHOLSER v. NATIONAL HOME FOR DISABLED SOLDIERS.

[68 Ohio St. 236, 67 N. E. 487.]

JURISDICTION OF SUITS Against the United States.—No suit can be maintained against the United States or against its property in any court without the express authority of Congress. (p. 659.)

UNITED STATES—What Suits Deemed to be Against.—A suit against a public corporation having no other powers than the performance of a function of the government, and accomplishing no other object, is plainly a suit against the government and its property. (p. 660.)

THE UNITED STATES has not Consented to be Sued for Its Torts. (p. 661.)

JURISDICTION.—An Action of Tort cannot be Sustained Against "The National Home for Disabled Volunteer Soldiers," though it has power to take, hold, and convey real and personal property, and to sue and be sued in the courts of law and equity. Such an action is, in effect, against the United States, and it has not consented to be sued for torts. (p. 662.)

Action to recover for damages claimed to have been suffered by the plaintiff from the negligence of the defendant whereby a large quantity of water was discharged from its lands onto his. Verdict and judgment in the trial court for the plaintiff, but on appeal to the circuit court the judgment was reversed.

and the plaintiff's petition dismissed. Thereupon a writ of error was prosecuted by the plaintiff.

Young & Young, for the plaintiff in error.

McMahon & McMahon, for the defendant in error.

246 DAVIS, J. The controlling question in this case is whether the defendant can be sued for a tort. It is a well-established principle in our jurisprudence that no suit can be maintained against the United States, or against its property, in any court, without express authority of Congress. In some of the cases it has been held that for the purposes of jurisdiction there is no distinction between suits against the government directly, and suits against its property: *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. Rep. 418; *Stanley v. Schwalby*, 162 U. S. 255, 269, 270, 16 Sup. Ct. Rep. 754. The defendant is admitted to be a corporation. Territorially it is within the jurisdiction of the state of Ohio; but by the act of Congress ceding that jurisdiction, it is provided that nothing contained in that act shall be construed to impair the powers and rights in and over said territory theretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers. These powers and rights were conferred upon the President of the United States, the Secretary of War, the chief justice and nine **247** others chosen from time to time by Congress, constituting "a board of managers of an establishment for the care and relief of the disabled volunteers of the United States army, to be known by the name and style of 'The National Home for Disabled Volunteer Soldiers,' and have perpetual succession, with powers to take, hold and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity, and to make by-laws, rules and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto." Congress reserved the right to at any time amend, alter or repeal the laws relating to the National Home for Disabled Volunteer Soldiers. This eleemosynary corporation, as it has already been denominated by this court (*Renner v. Bennett*, 21 Ohio St. 442), therefore remains in all respects, as it was originally, an institution of the government of the United States for the administration of a charity of the United States. It continues to be, as it always has been, maintained by the funds of the government of the United States. All of the property held in its name was paid for by the United States;

and that it is performing an appropriate and constitutional function of the general government nobody doubts; for at this time it is too late to question the power of Congress to create corporations for such purposes: *Osborn v. Bank of United States*, 9 Wheat. 738, 859, 872; *McCulloch v. Maryland*, 4 Wheat. 316, 411, 422; *Luxton v. North River Bridge Co.*, 153 U. S. 529, 14 Sup. Ct. Rep. 891. But, as was remarked by Chief Justice Marshall, in *Osborn v. Bank of United States*, 9 Wheat. 860, this corporation is not a private corporation but "a public corporation created for public ²⁴⁸ and national purposes." It is "an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' It is not an instrument which the government found ready made, and has supposed to be adapted for its purposes; but one which was created in the form in which it now appears, for national purposes only." A suit against a public corporation having no other powers than the performance of a function of the government and accomplishing no other object is plainly a suit against the government and its property, although nominally it is a suit against the corporation only. This principle was applied by this court in *Finch v. Board of Education*, 30 Ohio St. 37, 47, 27 Am. Rep. 414, in which it was held that, in the absence of a statute creating the liability, a board of education, which was incorporated by an act of the general assembly, passed March 9, 1849, was not liable in its corporate capacity for damages resulting from its negligence in erecting and maintaining a school building. It was held that the defendant was "a public agent employed in administering the common-school system of the state," and that there is no principle of the common law by which the action could be supported.

In *Board of Commissioners v. Mighels*, 7 Ohio St. 109, a case in which the liability for tort of mere governmental agencies, in the absence of express consent of the sovereignty, is denied, Brinkerhoff, J., clearly distinguished municipal corporations and counties as follows:

"Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them.

"Counties are local subdivisions of a state, created ²⁴⁹ by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked

for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

"A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

This is exactly the distinction which we make here between the defendant in this case and municipal or commercial corporations.

The general doctrine in regard to the liability of the government for torts is thus stated: "Even the state or the general government may be guilty of individual wrongs; for, while each is a sovereignty, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent. But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains; and it is ²⁵⁰ always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury": Cooley on Torts, 122, 123. The United States has consented to be sued on its contracts, either in the court of claims or in a circuit or district court of the United States; but it has not yet consented to be liable to actions for torts: *Belknap v. Schild*, 161 U. S. 17, 16 Sup. Ct. Rep. 443. Therefore, we are not persuaded by the argument that the power conferred upon this corporation, of suing and being sued both at law and in equity, must be construed as a consent by Congress that this particular governmental agency may be sued upon any cause of action, whether sounding in contract or in tort. On the contrary, we are constrained, upon all considerations, to regard this as imposing the power and liability to sue and be sued in respect to such matters only as are within the scope of the other corporate powers of the defendant. The National Home for Disabled Soldiers was

not given the right to commit wrongs upon individuals. It was not contemplated that it would do so. It was created and is perpetuated by the federal government for a very different purpose. Hence, it cannot be inferred that Congress meant to impose a liability upon this corporation so unusual, so different from its general policy and so different from the liabilities imposed on other public agencies.

The defendant has no corporate fund, nor any property applicable to the payment of a judgment in such an action as this. A judgment could not be satisfied except by seizing upon the property and funds supplied by the general government for the purpose for which the defendant was created, and without which it must cease to exist. Execution against the defendant ²⁵¹ would not only bring on conflict between the state and federal governments, but, if allowed, it would tend to the destruction of this splendid national charity. It is no answer to these considerations to say that a judgment in damages for the tort would be an ascertained basis for an appeal to Congress for satisfaction; for, as is said by the eminent author already quoted, it is to be presumed that the sovereign is always ready and willing to do justice, and a judgment in the courts, when unauthorized by the government, would not only be altogether vanity, an empty result, but would be an indecorous assumption of the right to advise the general government as to its duty, and of the right to make the judgment the basis of a demand precluding inquiry by the general government as to its ultimate liability. The courts can be better employed than in doing a useless thing.

We, therefore, conclude that the right to sue the National Home for Disabled Volunteer Soldiers for a tort was never contemplated nor conferred. In *Finch v. Board of Education*, 30 Ohio St. 37, 27 Am. Rep. 414, this court so construed the power "to sue and be sued" contained in the charter of the board of education. Likewise in *Board of Commissioners v. Mighels*, 7 Ohio St. 109, 114-117.

The judgment of the circuit is affirmed.

Burket, C. J., Shauck, Price, and Crew, JJ., concur.

A Suit cannot be Maintained against the United States or a state without its consent; *Note to Orleans Navigation Co. v. Schooner Amelia*, 12 Am. Dec. 517, 518; *Cornwall v. Commonwealth*, 82 Va. 644, 3 Am. St. Rep. 121. A state is not liable for the negligence or misfeasance of its officers or agents, except when such liability is voluntarily assumed by the legislature: *Bourn v. Hart*, 93 Cal. 321, 27

Am. St. Rep. 203, 28 Pac. 951; Chapman v. State, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457. And a county or city has been held not liable for a tort, unless expressly made so by statute: Davis v. Ada County, 5 Idaho, 126, 95 Am. St. Rep. 166, 47 Pac. 93; Morrison v. Eau Claire, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280. A board of education in the absence of statute, is not answerable in its corporate capacity for an injury to a pupil from its negligence in the erection and maintenance of a school building: Finch v. Board of Education, 30 Ohio St. 37, 27 Am. Rep. 414. And a child attending a public school provided by a city cannot maintain an action against the city for injury suffered by reason of an unsafe staircase: Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332.

READ v. TOLEDO LOAN COMPANY.

[68 Ohio St. 280, 67 N. E. 729.]

CONVEYANCE—Witnesses to—When not Disqualified by Interest.—The fact that the subscribing witnesses to a deed are stockholders in the corporation grantee, or have some other interest not apparent on the face of the deed, does not disqualify them from acting as such witnesses. (p. 667.)

CONVEYANCE—Acknowledgment of is not a Judicial Act.—An officer, on taking and certifying an acknowledgment of a conveyance, does not exercise judicial functions. His act, though official, is purely ministerial. (p. 670.)

CONVEYANCE—Acknowledgment of Before Interested Officer.—A stockholder in a corporation who is also a notary public is not disqualified to take and certify an acknowledgment of a conveyance to it. (p. 672.)

Action by Read as assignee for the benefit of creditors of Cary D. Lindsay for an order to sell certain real property to pay the debts of his assignor. The Toledo Loan Company, having been made a defendant, sought to assert a mortgage to it, and the validity of the mortgage and of its recording was denied, on the ground that the subscribing witnesses and the notary who took the acknowledgment were disqualified to act, because they were stockholders in the corporation in whose favor the mortgage was taken. The judgments of the trial and also of the circuit court were in favor of the defendant, and the plaintiff prosecuted a writ of error.

W. H. A. Read, for the plaintiff in error.

King & Tracy, for the defendant in error.

293 CREW, J. On the trial of this cause in the court of common pleas, at the request of the plaintiff, the court made and stated its finding of facts separate from its conclusions of

law, and the facts so found and stated by said court of common pleas are admitted to be correct, and they are not here in dispute. The sole controversy in this case arises upon the statement of facts contained in paragraphs 4 and 5 of its findings of fact so made by said court of common pleas. Said paragraphs are as follows:

²⁹⁴ "4. That prior to and upon February 19, 1896, said assignor, Cary D. Lindsay, was a member of said the Toledo Loan Company, and on said date subscribed for ten shares of the capital stock of said company; that thereupon, on the representation of said Cary D. Lindsay to said company, and upon agreement between said Cary D. Lindsay and said company, that said loan should become and be secured by a first lien upon said lots numbers 116 and 117 in Shaw's Monroe Street Addition to Toledo, Ohio, said the Toledo Loan Company, on February 19, 1896, loaned and advanced to said Cary D. Lindsay, the sum of four thousand eight hundred dollars (\$4,800), of and from the moneys theretofore raised by said company for said purpose of loaning to its members, said Cary D. Lindsay agreeing to repay said loan with interest, in weekly installments, in accordance with the constitution and by-laws of said company; that in pursuance of said representations and agreement, and to secure the payment of said money so loaned, with interest, and simultaneously with the loaning thereof, said Cary D. Lindsay executed, acknowledged and delivered to said defendant, the Toledo Loan Company, his certain mortgage for said sum of four thousand eight hundred dollars upon said lots numbers 116 and 117 in Shaw's Monroe Street Addition, aforesaid.

"5. That said mortgage was executed by said Cary D. Lindsay in the presence of Eva M. Ely and Grant Williams, and was acknowledged by said Cary D. Lindsay before Grant Williams, a notary public within and for Lucas county, Ohio; that at the time of the execution and acknowledgment of said mortgage, said Cary D. Lindsay was a stockholder in said the Toledo Loan Company, and Eva M. Ely and Grant Williams were each owners of two shares of the stock ²⁹⁵ of said company, and said Eva M. Ely and Grant Williams were not otherwise related to said the Toledo Loan Company, or in any wise employed by it; and said Cary D. Lindsay then knew that said witnesses and notary, respectively, were stockholders in said company."

Upon the foregoing facts, it is claimed by plaintiff in error:

"1. That inasmuch as Eva M. Ely and Grant Williams were both stockholders of the defendant company, the mortgage given to it by Cary D. Lindsay was never witnessed.

"2. That inasmuch as Grant Williams, the notary before whom said mortgage purports to have been acknowledged by Cary D. Lindsay, was a stockholder in said company, that said mortgage was never duly acknowledged.

"3. That never having been acknowledged and never having been witnessed as to its signature, said mortgage was not entitled to record in Lucas county, and the recording of the same was a nullity.

"4. That the plaintiff as assignee holds the legal title to said real estate free from all encumbrances or liens growing out of said mortgage."

It will thus be seen that the question here presented is: Whether a mortgage made to a corporation as grantee is invalid and of no effect by reason of the fact that the witnesses to such mortgage and the officer taking the acknowledgment thereof, are stockholders in said corporation. The requisites as to the manner and form of the execution of instruments for the conveyance or encumbrance of real property is matter of statutory regulation, and the statute providing for and governing the execution and acknowledgment of deeds, mortgages, etc., in ²⁹⁶ this state is section 4106 of the Revised Statutes, which section, so far as it has relation to the present inquiry, and application to the question here involved, provides as follows:

"A mortgage of any estate or interest in real property shall be signed by the mortgagor, and such signing shall be acknowledged by the mortgagor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation, and such signing shall also be acknowledged by the mortgagor before a judge of a court of record in this state, or a clerk thereof, a county auditor, county surveyor, notary public, mayor or justice of the peace, who shall certify the acknowledgment on the same sheet on which the instrument is written or printed, and subscribe his name thereto."

It will be observed that within the provisions of this section the only requirements are that the mortgage shall be signed by the mortgagor, that such signing shall be acknowledged by him in the presence of two witnesses who shall attest the same, and that such signing shall be acknowledged by the mortgagor before one of the several officers therein named, whose duty it shall be to make certificate thereon of said acknowledgment. But the qualifications of the witnesses so attesting and the officer so certifying are not attempted to be prescribed by said

section, nor is there in said statute any provision or even suggestion that a witness or officer shall be disqualified or rendered incompetent as such, by reason of being interested in the conveyance so witnessed and certified. In the absence, then, of any express provision in the statute forbidding it, the precise question here presented ²⁹⁷ is, whether a stockholder in a corporation, not otherwise interested therein, may be a witness to, and as notary public may take the acknowledgment of, a mortgage executed by another to such corporation; and the proper determination of this inquiry involves, to some extent at least, a consideration both of the purpose of the legislation requiring the observance of these formalities in the execution of a mortgage, and also of the capacity in which a notary acts in taking and certifying the acknowledgment of the grantor, whether such act on his part is judicial or ministerial in character. At common law attestation was not necessary to the validity of a deed or mortgage, and is not now necessary, except when required by statute. The purpose of the legislature in requiring that an instrument for the conveyance or encumbrance of real property shall be witnessed by two witnesses doubtless was that there might be on record, in a matter so important as that of the conveyance or encumbrance of real property, the names of two persons who certify or attest the fact that they saw the grantor sign the instrument or heard him acknowledge the same, and thereby to furnish an easy and effectual mode of proof of its execution, and thus provide an additional protection or security against the making of a fraudulent or forged conveyance or encumbrance. The certificate of acknowledgment by a notary public or other authorized officer is simply an additional solemnity in the execution of a deed or mortgage, and is required by statute chiefly for the purpose of affording proof of the due execution of the instrument by the grantor, sufficient to authorize the recorder to make the same matter of public record: Rev. Stats., sec. 4134. Jones on the Law of Real Property in Conveyancing, ²⁹⁸ at section 1126, in discussing the subject of "acknowledgment," says: "The chief use of an acknowledgment, as already noticed, is to perfect the deed for record. The grantor can select such authorized officer before whom to acknowledge his deed as he chooses. He may refuse to make his acknowledgment before an interested officer. Having voluntarily acknowledged the deed, the grantor is presumed to have voluntarily consented to its record. 'If his deed is found on record, apparently executed according to the forms of law, and

without any circumstances of suspicion against it, the plainest principle of equity would hold him estopped from setting up an undisclosed interest of the officer before whom he made his acknowledgment, to defeat his conveyance, as against an innocent purchaser relying upon the record as the evidence of his title.'

"An interest under a deed not apparent on its face does not disqualify an officer to take and certify an ordinary acknowledgment. Thus, if he is one of the beneficiaries in a deed of trust, he may take the grantor's acknowledgment, when his interest under the deed does not appear on the face of it. The fact that he acted as the agent of the mortgagor in obtaining the money does not disqualify him to take the mortgagor's acknowledgment."

What is here said by the author would seem to apply equally as well to the witnesses attesting the signature of the grantor as to the officer taking his acknowledgment. In an early case in this state (that of *Johnson v. Turner*, 7 Ohio, pt. 2, 216) it was decided by this court that a witness to a trust deed, given to secure an indebtedness to a bank, who at the time of the execution of such deed was a stockholder in said bank, was not thereby disqualified to act as ²⁹⁹ a subscribing witness to said deed, and that such deed was not thereby rendered invalid, nor could it, on that ground be impeached for want of sufficient attestation. The question there decided arose and was presented on the following agreed statement of facts: "Walter Turner was indebted to the Bank of Zanesville in the amount stated in the trust deed under which the plaintiffs claimed, and on the application of C. B. Goddard, Esq., the attorney for the bank, executed the deed which was prepared and signed by said Goddard, as one of the subscribing witnesses, he (Goddard) being a stockholder in the corporation."

In the opinion in that case the court say: "The first question for the consideration of the court is the objection to the trust deed, because, at the time of its execution, General Goddard, one of the subscribing witnesses, was a stockholder in the Bank of Zanesville. If this objection is sustainable, the deed is invalid to pass the legal title of the lands intending to be conveyed to the trustee for the security of the bank, and ought not to be received in evidence in support of a legal title in the plaintiff's lessors.

"But is not this deed in conformity with the statute? This is admitted, in all respects, excepting that General Goddard was

interested in the corporation for whose benefit it was made when he subscribed it as a witness, and it was executed by Turner.

"In England, the grantee must prepare the conveyance and present it to the grantor for execution. We know of no such rule here. The grantor prepares his own deed. He calls his witnesses; they ³⁰⁰ are selected by himself. He must then acknowledge its execution, and not until thus acknowledged does he part with its possession by a delivery to the grantee. Every act, therefore, is the act of the grantor while the deed remains in his possession, and the first act of the grantee is the acceptance when finally delivered to him. The grantor, then, should not, it appears to us, be permitted to object to a witness selected by himself, and in whose integrity he had reposed confidence, to bear witness to his own acts. But aside from this course of reasoning, is this deed invalid? The statute, volume 31, 346, section 1, requires the deed to be executed 'in the presence of two witnesses, who shall attest such signing and sealing and subscribe their names to such attestation.' Unless the express provisions of this statute, or its plain inference, lead to the conclusion that the witnesses to a deed must be credible and competent to prove its execution at the time of their attestation, and that such was the intention of the legislature, reluctantly indeed would this court adopt such an opinion. If such be the law, it is time to look around us and ascertain by whom our deeds bear witness."

As above stated, the court in this case held that the trust deed was sufficiently attested, was valid and could not be impeached by showing that Goddard, one of the attesting witnesses, was interested in the corporation. But it is here insisted by counsel for plaintiff in error that the doctrine of this case is modified and the authority of the case destroyed by the decision of this court in the later case of *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437, where it is held by this court that the grantee in an instrument for the conveyance or encumbrance of real ³⁰¹ property is disqualified to be an attesting witness to its execution or to act in an official character in taking and certifying the acknowledgment of the grantor. In the case of *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437, the instrument, the validity of which was in controversy, was acknowledged before, and was witnessed by, the person named therein as grantee, which fact readily distinguishes it from the case we are here considering. And that this distinction was not

overlooked, but was clearly recognized by the court, affirmatively appears from the language of Williams, J., who prepared the opinion in that case, when he says: "It is probably unnecessary to notice that this question was not involved in *Johnson v. Turner*, 7 Ohio, pt. 2, 216, and that case is unaffected."

The decision in *Johnson v. Turner*, 7 Ohio, pt. 2, 216, having been made by this court as early as the December term, 1836, and not having since been questioned or overruled by this court, has become a law of property in this state, and for that reason, if for no other, should now be followed and upheld. This decision in *Johnson v. Turner*, 7 Ohio, pt. 2, 216, must, therefore, be held to conclusively determine the question in this state that an instrument, conveying or encumbering real estate cannot be impeached, and will not be held invalid on the sole ground that the witnesses to such instrument are interested to the extent of being stockholders in the corporation named therein as grantee.

This leaves, then, only the question: Is the mortgage here in controversy invalid, because the notary public before whom the same was acknowledged was at the time of taking such acknowledgment a stockholder in the Toledo Loan Company, grantee in said mortgage? Counsel in this case upon both sides, as evidenced ³⁰² by their briefs, have been diligent in the collection and citation of authorities dealing with this question, and the cases cited show quite a conflict of authority and diversity of holding by the courts in the different states upon this question. There would seem to be two lines of authorities upon this proposition, the one holding that the act of a notary in taking and certifying an acknowledgment is a judicial act, the other holding it to be ministerial only. In those states holding the former doctrine, the notary is held to be incompetent and the instrument, therefore, invalid. While in those states holding the latter doctrine exactly the contrary decision is reached, and in most of the authorities cited by counsel the decision in each particular case seems to have turned upon or been controlled by the fact of whether the court rendering the decision regarded the act of the officer in taking the acknowledgment as judicial or ministerial in character. This distinction is noticed and discussed in the case of *Bank v. Conway*, 17 Fed. Cas. 1202 (No. 10,037). Judge Hughes, announcing the opinion of the United States district court in that case, among other things, says: "The question whether this writing was properly acknowledged or not, which was so ably and elaborately argued

at bar, is only a secondary one in the case. The primary question is, When did this writing become a deed as between the grantor and grantee? The acknowledgment of the writing by the grantor had reference only to its being recorded, and thereby made valid as against his creditors. If the question were only as to acknowledgment, I should decide, without hesitation, that it was properly acknowledged; for the teaching of the cases cited at bar seems to me plainly to be, that an interested person ³⁰³ may take the acknowledgment of a deed when the act is merely ministerial; although if the act be judicial, such as taking the acknowledgment, after privy examination of a married woman, an interested person cannot take it: *Harkins v. Forsyth*, 11 Leigh, 294; *Carper v. McDowell*, 5 Gratt. 212; *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393; *Taliaferro v. Pryor*, 12 Gratt. 277; *Johnston v. Slater*, 11 Gratt. 321; *Turner v. Stip*, 1 Wash. 319; *Hampton v. Stevens*, 10 Am. Law Reg. 107 (1971); *Boswell v. Flockheart*, 8 Leigh. 364; *Dimes v. Grand Junction Canal Co.*, 16 Eng. L. & Eq. 63.

This case was taken on appeal to the United States circuit court, and in that court Chief Justice Waite, announcing the opinion, said: "A deed may be acknowledged by the grantor before a notary public, and upon the certificate of the notary to that effect in proper form, recorded. The form of the certificate in this case is correct, but it is insisted that because Garnett, the notary, was interested as one of the beneficiaries in the trust, he was incompetent in law to receive and certify the acknowledgment. This presents the principal question in the case for our consideration.

"It has been frequently decided that an acknowledgment before a grantee named in a deed was of no effect: *Beaman v. Whitney*, 20 Me. 413; *Wilson v. Traer*, 20 Iowa, 232; *Stevens v. Hampton*, 46 Mo. 404; *Groesbeck v. Seeley*, 13 Mich. 329. It has also been held that a party interested in a deed cannot take and certify the acknowledgment of a married woman requiring a privy examination: *Withers v. Baird*, 7 Watts, 228, 32 Am. Dec. 754. The taking of such an acknowledgment is, in some respects, a judicial act, and not ministerial only, but in the case of an ordinary acknowledgment ³⁰⁴ it is purely a ministerial act: *Truman v. Lore*, 14 Ohio St. 151; *Lynch v. Livingston*, 6 N. Y. 430, 434. Upon this principle it was decided in *Dussaume v. Burnett*, 5 Iowa, 95, that an acknowledgment before one not a grantee named in the deed, but interested in the conveyance, was good. The same distinction was recognized in *Stevens v. Hampton*, before cited."

And further in the same opinion it is said: "A certificate of acknowledgment is required to perfect a deed for record. The grantor can select such authorized officer for that purpose as he chooses. He had full power to protect himself against frauds by interested parties as certifying officers, for he may refuse to make his acknowledgment before them." And in this case it was held that the notary taking the acknowledgment was not disqualified, and that the deed was valid.

It has been twice held by the supreme court of this state that in Ohio the officer does not exercise judicial functions in taking an acknowledgment, and that his act, though official, is purely ministerial: *Truman v. Lore*, 14 Ohio St. 151; *Williamson v. Carskadden*, 36 Ohio St. 664. And that the legislature in the enactment of the present statute so regarded it is, we think, clearly indicated by the fact that the power to take acknowledgments is not limited by the statute to judicial officers alone, such as the judge of a court of record, mayor, or justice of the peace, but is conferred as well upon county auditors, county surveyors, and notaries public. It would seem that in those instances where the legislature intended to disqualify or limit the authority of a notary public to act in his official capacity, it has done so by express and positive statutory provision—³⁰⁵ for instance, by section 111 of the Revised Statutes, it is provided: "No banker, broker, cashier, director, teller, or clerk of any bank, banker or broker or other person holding any official relation to any bank, banker or broker shall be competent to act as notary public in any matter to which said bank, banker or broker is in any way interested."

By section 5269 of the Revised Statutes a notary public is one of the officers authorized to take depositions, but it is provided by section 5271 that such notary must not be a relative or attorney of either party or otherwise interested in the event of the action or proceeding in which the deposition is taken. If, therefore, it had been the policy and purpose of the legislature to prohibit a stockholder of a corporation from acting as notary public in the taking and certifying of an acknowledgment to an instrument in which such corporation was interested, it would doubtless have so provided in section 4106, and in the absence of any statutory inhibition the disqualification of the notary to act will not be presumed.

In the case at bar it is admitted that Cary D. Lindsay, the assignor, at the time he acknowledged this mortgage, knew of the relation the notary, Grant Williams, sustained to the Toledo

Loan Company, and knew that he was then the holder of two shares of stock in said company, and there is in this case no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest or relationship, nor is there any claim but that the acknowledgment was freely and fairly made in the honest belief that it was in all respects authorized and sufficient. To hold, then, under such circumstances, that the mortgage here in controversy was invalid, unless impelled thereto by statutory requirement ³⁰⁸ or the plainest considerations of public policy, would, it seems to us, be a subversion of justice, and would be contrary to the plainest principles of equity and fair dealing. In affirming the judgment of the court of common pleas in this case the circuit was right, and its judgment is affirmed.

Lurket, C. J., Spear, Davis, Shauck and Price, JJ., concur.

The Acknowledgment of an Instrument in which a corporation is financially interested cannot be taken by a stockholder therein: Ogden Bldg. etc. Assn. v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; Hayes v. Southern Home etc. Assn., 124 Ala. 663, 82 Am. St. Rep. 216, 26 South. 527. But see Cooper v. Hamilton, 97 Tenn. 285, 37 S. W. 12, 56 Am. St. Rep. 795, and note. As to whether the taking of an acknowledgment is a judicial act, see the monographic note to American Freehold etc. Co. v. Thornton, 54 Am. St. Rep. 150, 151.

Subscribing Witness.—A mortgagee in a chattel mortgage is disqualified from being a subscribing witness thereto, by reason of being an immediate party thereto: *Donovan v. St. Anthony etc. Elevator Co.*, 8 N. Dak. 585, 73 Am. St. Rep. 779, 80 N. W. 772.

PEOPLE'S SAVINGS BANK COMPANY v. PARISSETTE.

[68 Ohio St. 450. 67 N. E. 896.]

A COVENANT OF GENERAL WARRANTY does not by itself include a covenant against encumbrances. (p. 674.)

COVENANTS—Dower.—A Covenant of Warranty is not Broken by the outstanding, inchoate right of dower. (p. 675.)

VENDOR AND VENDEE—Specific Performance—Dower.—Where an option stipulates that, on payment of a sum specified, "we bind ourselves to convey, by good warranty deed and abstract of title from the organization of the county," and is signed by a married man, he is not bound to procure his wife's release of her inchoate right of dower, but only to make a conveyance executed by himself containing a covenant of general warranty and to furnish an abstract of title from the organization of the county. Hence, in a

suit against him for specific performance, the court is not authorized to decree that he convey, allowing the vendee to retain so much of the purchase price as will protect his title against the right of dower. (p. 676.)

Action by the People's Savings Bank Company against Charles Parissette and his wife to enforce specific performance. The contract upon which the suit was founded recited that, for and in consideration of fifty dollars, received from F. J. Wettach, "We do hereby give said F. J. Wettach, his heirs and assigns, the refusal to purchase of us until December 15, 1900, for the sum of twenty-four thousand dollars the following described tract of land" (after which the description follows), and "if said F. J. Wettach, his heirs or assigns, at any time, on or before said date, pays the said sum as above set forth, we do hereby bind ourselves our heirs, administrators or assigns, to convey to said F. J. Wettach, his heirs, administrators or assigns, by good warranty deed and abstract of title from organization of county, of said above tract or lot of land." This contract was signed by the husband alone. Before the commencement of the suit the contract was assigned by Wettach to the plaintiff, which tendered the sum specified in the contract, and demanded a conveyance. Parissette thereafter tendered the plaintiff a warranty deed of the property properly executed by himself alone. The court found that the plaintiff was entitled to no relief against the wife, and ordered Parissette to deliver to the plaintiff the deed so tendered upon payment to him of the balance of the purchase price. The plaintiff company prosecuted writ of error.

Nathan Morse, for the plaintiff in error.

Stuart & Stuart, for the defendants in error.

457 SPEAR, J. It is insisted by counsel for plaintiff in error that the stipulation in the option is for a deed conveying the entire property free from any and all rights, claims and encumbrances, and of the latter class is the inchoate right of dower; that the obligation, therefore, rested on the vendor to clear the title, and convey free of all claims of every kind; that failing this the vendee should have been allowed to retain so much of the purchase money as will protect his title against such inchoate right of dower, and the vendor decreed to convey on receiving the remaining part of the purchase money, and that the refusal of the circuit court to so adjudge was error.

This proposition of counsel assumes that a wife's inchoate right of dower is an encumbrance on her husband's land, and

that the optional contract contains a stipulation on the part of the vendor that he will convey by deed embracing a covenant against encumbrances. While the first proposition seems never to have been distinctly decided in Ohio, the law is so held by courts of last resort in a number of the states, notably Maine, Massachusetts, Indiana, Wisconsin, Iowa and Michigan, and it is declared ⁴⁵⁸ by Judge Scribner, in his admirable work on Dower (volume 2, page 3), after a review of the authorities, that "A right of dower, although inchoate, is so far an encumbrance upon the lands on which it attaches as to be within the operation of the ordinary covenant against encumbrances." But if this proposition be conceded, still the plaintiff must establish that the contract binds the vendor to convey by deed containing the usual covenant against encumbrances. It is clear that there is not a specific stipulation to that effect. The language is: "By a good warranty deed and abstract of title from organization of county." The term "warranty" usually implies a warranty of the title, and that it was the matter of title that the parties had in mind in framing this stipulation is manifest from the terms used. The purchaser was to have in his deed a warranty of title, and accompanying the deed an abstract of title. A covenant of warranty and a covenant against encumbrances are essentially different in their nature. A breach of the one is ordinarily attended by consequences differing from those following a breach of the other. The former is in the nature of a covenant for quiet enjoyment. As well defined by Collet, J., in *King v. Kerr*, 5 Ohio, 155, 22 Am. Dec. 777, it "is an undertaking by the warrantor that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, by the setting up of a superior title, that he will make compensation in money for the loss sustained by such failure. . . . This covenant is not broken until the grantee, his heir or assignee, is evicted from or disturbed in the enjoyment of the premises, or a part of them, by the setting up of a superior or paramount title." To which may be added the qualification that the covenant may ⁴⁵⁹ be broken by any disturbance of possession which is equivalent to an eviction. The latter covenant is a stipulation against all rights to, or interest in, the land which may subsist in third persons to the diminution of the value of the estate, though consistent with the passing of fee by the deed, and such covenant, if there be an encumbrance, is broken so soon as made. We are aware that it has been held, here and there, that an agreement for a good and sufficient warranty deed implies a deed embracing covenants usually con-

tained in deeds in this state, but we are not aware of any authoritative holding to the effect that the term "good warranty deed," where used in a contract in direct connection with the matter of title, implies, as conclusion of law, more than it expresses, and we are not ready in this case, under the peculiar facts of it, to affirm the unqualified position of counsel in this respect. Indeed, as we understand it, the settled rule is that a covenant of general warranty, by itself, does not include a covenant against encumbrances (*Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385); and it is stated unqualifiedly by a learned author that a covenant of warranty is not broken by an outstanding inchoate right of dower: 3 Washburn on Real Property, sec. 2389. Manifestly it could not be. Even though it be conceded that the covenant of warranty is sufficient to cover a claim for dower, yet there has been no eviction, and nothing equivalent to an eviction. There has, therefore, been no breach, and there may never be. In a situation where the dower right has become consummate, and the claim prosecuted so that the purchaser has been deprived of the possession of a portion of the land, a different case is presented: *Johnson v. Nyce*, 17 Ohio, 66, 49 Am. Dec. 444; *Nyce v. Obertz*, 17 Ohio, 71. If this position ⁴⁶⁰ is maintainable, and it is difficult to see why it is not, it would be a full answer to the demand for a decree against the husband requiring a conveyance embracing a release of dower by the wife to say that he had incurred no obligation to that effect, and therefore it is not essential to the performance of his contract that his wife should join in the deed and release her right of dower; and the conclusion would also afford a full answer to the demand that a portion of the purchase money be withheld until the dower right becomes consummate, or is extinguished by the decease of the wife.

But suppose this position be doubted, still there is another phase of the case which we are unanimous in thinking satisfactorily disposes of it. Let us inquire more specifically into the terms of the agreement, and the inferences to be drawn from it. What was the contract specific performance of which plaintiff demanded, and what the breach, if any? The parties were the vendor, the husband, and the vendee, the plaintiff. The paper itself carries the information that it was when drawn contemplated to be executed by some one other than the vendor, and since the plaintiff was aware that he had a wife living, the inference is natural that she was the person whose signature had been expected. The paper further showed that she had not signed, and the fact found is that she had made no agree-

ment to sign or sell the property, or release her inchoate right of dower. Furthermore, the absence of her signature would suggest a refusal by her. The company knew, therefore, that it was dealing with the husband alone as to his right and title in the property; it knew that the wife could not be compelled to sign, and that, therefore, the contract ⁴⁶¹ was impossible of specific execution if construed to include her dower. It knew that it was accepting a contract which on its face did not purport to sell any interest but that of the husband, and especially did not purport to sell or agree to convey any inchoate dower of the wife. In this situation of affairs the company chose to agree to pay the stipulated price for just what the option purported to sell. No fraud, or overreaching, or mistake of any kind is charged. The vendor is ready to convey just what the stated terms of his contract obligate him to convey. How can the company reasonably demand that the court import into the contract a stipulation to convey by a deed containing a covenant against this dower right, when no agreement of that character, nor respecting encumbrances of any kind, is expressed, and when in all probability, had such demand been made of the vendor, he would have refused to comply with it? We think it cannot. The effect of the construction contended for by counsel would be either to attempt to arrive at a sum to be deducted absolutely by a process admittedly speculative, or to suspend the payment of a considerable portion of the purchase money to the grantor during the joint lives of himself and his wife, which, it seems to us, could never have been within the contemplation of the parties when this optional contract was signed. Plaintiff was in a court of equity pressing an inequitable demand. We think it was properly refused. On the plaintiff's own construction of the option the company is in the attitude of one who takes the promise of another to do that which it is known he cannot perform except by the concurrence of a third person. Such purchaser contracts with full notice of the uncertainty attending ⁴⁶² the seller's ability to perform, and, not having been misled to his injury, cannot now ask the extraordinary aid of a court of conscience in repairing such loss, if any, as he has sustained by the vendor's failure to complete his contract.

A number of cases cited by counsel in his brief hold the contrary doctrine, but our conclusion is in accord with the holding of this court in *Lucas v. Scott*, 41 Ohio St. 636. It is also the doctrine of the English courts, for which see *Pomeroy on Contracts*, sections 442, 458, 461, *Castle v. Wilkinson*, L. R. 5 Ch.

534, and *James v. Lichfield*, L. R. 9 Eq. 51. Likewise of the courts of New Jersey, Pennsylvania and Illinois: *Hulmes v. Thorpe*, 5 N. J. Eq. 415; *Young v. Paul*, 10 N. J. Eq. 401, 64 Am. Dec. 456; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Welsh v. Bayaud*, 21 N. J. Eq. 186; *Reilly v. Smith*, 25 N. J. Eq. 158; *Peeler v. Levy*, 26 N. J. Eq. 330; *Clark v. Seirer*, 7 Watts, 107, 32 Am. Dec. 745; *Riesz's Appeal*, 73 Pa. St. 485; *Humphrey v. Clement*, 44 Ill. 299. See, also, *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385, and 2 Story's *Equity*, secs. 730-735.

The judgment and order as rendered are affirmed.

Burket, C. J., Davis, Shauck, Price and Crew, JJ., concur.

Where a Husband Contracts to Convey Land, but at the time the deed is due his wife refuses to convey her dower interest therein, and the vendee insists upon the enforcement of the contract, there are authorities holding that he must be satisfied with a conveyance from the husband alone of all his interest, and his remedy over for damages, and that he will not be allowed to retain sufficient of the purchase money to cover the contingent interest of the wife: See the note to *Leach v. Forney*, 89 Am. Dec. 579; *Burk's Appeal*, 75 Pa. St. 141, 15 Am. Rep. 587; *Burk v. Serrill*, 80 Pa. St. 413, 21 Am. Rep. 105; *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558. Compare *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Leach v. Forney*, 21 Iowa, 271, 89 Am. Dec. 574.

ST. MARYS MACHINE COMPANY v. NATIONAL SUPPLY COMPANY.

[68 Ohio St. 535, 67 N. E. 1055.]

CHATTEL MORTGAGES—When Vest All Property Rights in the Mortgagee.—If a chattel mortgage is past due, the property covered thereby must be regarded as the property of the mortgagee. The mortgagor while he has a right of redemption has no property in the mortgaged chattels, within the meaning of a section of the Revised Statutes of Ohio providing that, when the property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor within three months prior to the appointment of such assignee, receiver, or trustee shall first be paid out of the trust fund in preference to all claims, except for taxes and the costs of administering the trust. The trust fund so referred to is what remains in the hands of the assignee or trustee, after the payment of valid liens and securities. (pp. 679, 681.)

Action by the National Supply Company commenced in February, 1901, against L. E. Bloomfield and several chattel mortgagees, which action was based on a chattel mortgage to the

plaintiff. The court appointed receivers who, under its order, took possession of all the property of Bloomfield, including that covered by the chattel mortgages, and converted it into money, and brought it into court for distribution. All the mortgages were past due when the action was commenced. Claims for labor performed for Bloomfield within three months before the appointment of the receivers were filed and allowed, and the amount of these claims was not in dispute, but the question was presented respecting their priorities, the fund realized not being sufficient to pay all. The circuit court held that the labor claims must first be paid in full. This action would naturally prevent the chattel mortgagees from receiving full payment of the amounts due them, and they therefore saved proper exceptions and brought the case to the supreme court.

D. F. Mooney and Richie, Leland & Roby, for the plaintiff in error.

Ira C. Taber, for the National Supply Company.

Cable & Parmenter, for I. B. Post.

Ridenour & Halfhill, for Hilliard & Clark, defendants.

I. R. Longworth, for labor claimants other than Clark and Hilliard.

537 BURKET, C. J. The solution of the controversy between the parties depends upon a proper construction of section 3206a of the Revised Statutes. That section is as follows: "Laborers and employes of any persons, association of persons or corporation, whether such employment be at agriculture, mining, manufacture or other manual labor, shall have a lien upon the real property of their employers for their wages, which is hereby declared to be superior to the following liens taken or attaching during the existence of such unpaid labor claims, to wit: Liens of attachment, liens of mortgages given or taken at a time of actual insolvency of the debtor, or with a view of preferring creditors or to secure a pre-existing debt, and superior to ⁵³⁸ all claims for homestead or other exemptions, except under section 5430; and in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed, shall first be paid out of the trust fund, in preference to all other claims against such employer, except claims for

taxes and the costs of administering the trust. The lien herein provided shall be deemed to be waived by the laborer or employé, as to any portion of such labor, unless within thirty days from the expiration of three months from the performance of such portion he shall file with the recorder of the county where the labor was performed an itemized statement verified by affidavit of the amount, kind and value of the labor performed within said period, with all credits and offsets, and the amount then due him therefor, which verified statement when so filed shall be recorded in a book kept for the purpose, and shall become and operate as a lien upon the real property of the employer without any specific description thereof, for the period of one year from and after the filing thereof, and if an action is brought to enforce the lien within that time, it shall continue in force until finally adjudicated; and the proceedings to enforce such lien shall be the same as in other cases of lien against the owner of the property and all other persons interested; provided, that if several persons have or obtain liens under the provisions of this section against the property of the same employer, they shall have no priority among themselves, but shall be paid pro rata, nor shall they have priority over those obtaining liens under sections 3184, 3185 ⁵³⁹ 3186, 3187 of this chapter, but the persons obtaining liens under said sections 3184, 3185, 3186, and 3187 shall have priority as provided therein."

As there was no real estate in this case, the only part of the section here applicable is the following: "And in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed shall be first paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the cost of administering the trust."

As the amount found due the St. Marys Machine Company was greater than the value of the mortgaged property, as shown by the amount for which it sold, the property covered by the mortgage was the property of the machine company, and not the property of Mr. Bloomfield. All he had was a right of redemption, by payment of the debt: *Sayler v. Simpson*, 45 Ohio St. 141, 150, 12 N. E. 181. This is a property right, but not property itself, within the purview of this section. It was, therefore, not the property of the employer, Mr. Bloomfield, but the property of the machine company, that came into the

hands of the receivers in this case, and according to the holding of this court in *Hughes v. City Hall Bank*, 61 Ohio St. 386, 55 N. E. 1001, it could not be subjected to the payment of labor claims under this section.

Again, said section provides that such labor claims "shall be first paid out of the trust fund, in preference ⁵⁴⁰ to all other claims," etc. "Trust funds," under this section, must be the same, whether the estate is in the hands of an assignee, receiver or trustee, and in all such cases the fund for distribution among creditors generally is known as a trust fund, because the person in charge of the estate holds the fund in trust for all who can show themselves to be beneficiaries under the general law of the land, and not entitled as owners in whole or part, by virtue of a special property or particular lien. As to such the receiver holds the property or its proceeds not in the sense of a trust fund, but under a special obligation to restore it to its owner.

The correctness of the foregoing holding is strengthened by a reference to section 6355 of the Revised Statutes, which is in pari materia with said section 3206a, and both sections must be read and construed together. Section 6355 is as follows: "All taxes of every description assessed against the assignor upon any personal property held by him before his assignment shall be paid by the assignee or trustee out of the proceeds of the property assigned in preference to any other claims against the assignor, and every person who shall have performed any labor as an operative in the service of the assignor shall be entitled to receive out of the trust funds, before the payment of the other creditors the full amount of the wages due to such person for such labor performed within twelve months preceding the assignment not exceeding three hundred dollars. But the foregoing provisions shall not prejudice or in any way affect securities given or liens obtained in good faith, for value, but judgments by confession on warrants of attorney rendered within two months prior to such assignment, or securities given within such time to ⁵⁴¹ create a preference among creditors or to secure a pre-existing debt other than upon real estate for the purchase money thereof, shall be of no force or validity as against such claims for labor to the extent above provided, in case of assignment."

This section provides for the distribution of the assets of the estate of an insolvent in cases of assignments for the benefit of creditors, and provides for the payment of labor claims of operatives in the service of the assignor, for labor performed within

twelve months, not exceeding three hundred dollars, but such labor claims cannot prevail over securities given or liens obtained in good faith for value. From this it is clear that the fund out of which such labor claims can be paid in cases of assignees or trustees in insolvency is the general fund remaining after the payment of all securities and liens obtained in good faith for value. This general fund corresponds to, and is the same as, the "trust fund" mentioned in said section 3206a, and each of said funds is what remains after the payment of the valid securities and liens against the property in the hands of the assignee or trustee; and to the extent of such securities and liens, construing both sections together, the property in the hands of the assignee or trustee is not regarded as the property of the employer, but as the property of the owner of the security or lien, and as being so connected with the property of the employer or assignor as to require the whole to be administered by the assignee or trustee, rendering to the owner of the securities and liens the proceeds of their property, and distributing by order of the probate court the remainder among the general creditors, subject to the rights of labor claims. Under the one section a labor claim includes all labor within ⁵⁴² twelve months, not exceeding three hundred dollars, and in the other the period is only three months with no limitation as to amount. In this regard there seems to be some conflict, but in any particular case the laborer should be allowed to invoke the provision most favorable to himself.

Said section 6355 applies only to assignees and trustees, while the other section applies to assignees, trustees and receivers; but when the section is properly construed as to assignees and trustees, the same construction must be applied to receivers, because in said section 3206a all three stand upon exactly the same footing.

This section of the statute has been differently construed by the circuit court in several cases, and while the true construction may not be clear at a glance, after mature deliberation and a full examination of the principles involved, the above construction seems to be clearly warranted, and when so construed the section is constitutional. With this construction of the section the other questions, so ably argued by counsel, become unimportant, and are not here considered.

The judgment of the circuit court will be reversed, and cause remanded to that court with instructions to render a judgment of distribution, applying the net proceeds of the sale

of the property covered by each chattel mortgage to the payment of the amount due upon such mortgage, preserving priorities where there are two or more chattel mortgages on the same property, and that the balance, if any, be applied upon the labor claims pro rata.

Judgment reversed, and judgment for plaintiff in error.

Spear, Davis, Shauck, Price and Crew, JJ., concur.

THE TITLE AND RIGHTS OF THE HOLDER OF A CHATTEL MORTGAGE AFTER CONDITION BROKEN.*

- I. Legal Title of the Mortgagee.
 - a. Common-law Rule.
 - b. General Rule.
 - c. Minority Rule.
- II. Mortgagee's Right of Possession.
 - a. In General.
 - b. Effect of a Setoff.
 - c. Use of Force in Obtaining Possession.
 - d. Provisions in the Mortgage.
 - e. Sureties as Mortgagees.
- III. Where Mortgage is Due upon a Contingency.
- IV. Where Given for Different Debts.
- V. Effect of Mortgagor's Death.
- VI. Mortgagor as Mortgagee's Bailee After Default.
- VII. Rights of Mortgagee as Against Levying Officer of Mortgagor.
- VIII. Remedies of Mortgagee.
 - a. Absolute Owner for Purpose of Suit.
 - b. Replevin.
 - c. Detinue.
 - d. Trover.
- IX. Effect of Tender by Mortgagor.
- X. Partial Payments.
- XI. Mortgagee's Right of Foreclosure and Sale.
- XII. Rights Between Mortgagees.
- XIII. The Principal Case Contrasted with Former Ohio Decisions.

I. Legal Title of the Mortgagee.

a. Common-law Rule.—The rule at common law in regard to mortgaged personal property after condition broken was that the title thereto vested absolutely in the mortgagee, that no foreclosure was necessary, and that there was no right of redemption in the mortgagor: *Frankenthal v. Mayer*, 54 Ill. App. 160; *Winchester v. Ball*, 54 Me. 558; *Pyeatt v. Powell*, 51 Fed. 551, 2 C. C. A. 367, 10 U. S. App. 200.

*REFERENCE TO MONOGRAPHIC NOTE.

Rights and remedies of chattel mortgagor whose property has been wrongfully sold: 16 Am. St. Rep. 499.

b. General Rule.—In most of the jurisdictions of this country the mortgagee is considered as the absolute owner at law, the mortgagor, however, having a right of redemption, which can be enforced only in equity: *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271; *Crocker v. Burns*, 13 Colo. App. 54, 56 Pac. 199; *Phillips v. Hawkins*, 1 Fla. 262; *Constant v. Matteson*, 22 Ill. 546; *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636; *O'Neil v. Patterson*, 52 Ill. App. 26; *Brookover v. Hurst*, 58 Ky. (1 Met.) 665; *Flanders v. Barstow*, 18 Me. 357; *Gates v. Smith*, 2 Minn. 30; *Thornhill v. Gilmer*, 12 Miss. (4 Smedes & M.) 153; *Robinson v. Campbell*, 8 Mo. 365; *Robertson v. Campbell*, 8 Mo. 615; *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145; *Jones v. Martini etc. Co.*, 77 Mo. App. 474; *Holmes v. Strayhorn etc. Co.*, 81 Mo. App. 97; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Brown v. Bement*, 8 Johns. 96; *Auckfley v. Finch*, 7 Cow. 290; *Stoddard v. Denison*, 32 N. Y. Super. Ct. (2 Sweeny) 54, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309; *Lambert v. Leland*, 2 N. Y. Super. Ct. (2 Sweeny) 218; *Lewis v. Palmrer*, 28 N. Y. 271; *Judson v. Easton*, 58 N. Y. 664; *St. Marys Mach. Co. v. National Supply Co.* (the principal case), 68 Ohio St. 535, 67 N. E. 1055; *Reese v. Lyon*, 20 S. C. 17; *McClendon v. Wells*, 20 S. C. 514; *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947; *Nichols v. Webster*, 1 Chanl. (Wis.) 203, 2 Pinn. 234; *Flanders v. Thomas*, 12 Wis. 410; *Klinkert v. Fulton etc. Co.*, 113 Wis. 493, 89 N. W. 507; *In re Haake*, Fed. Cas. No. 5884, 2 Saw. 231.

It is held in *Doane v. Garretson*, 24 Iowa, 351, that, the mortgagor having an equity of redemption after condition broken, the mortgagee's title and possession are not so absolute and complete that he cannot be required, on garnishment, to account for the surplus of the property or its proceeds, after payment of the mortgage debt, as property of the mortgagor in his hands.

Where the mortgage is payable on demand, demand must be made: *Ely v. Carnley*, 19 N. Y. 496; and having been made, the title becomes absolute in the mortgagee: *Hulsen v. Walter*, 34 How. Pr. 385.

c. Minority Rule.—The minority rule holds that the mortgagor's title is not divested by failure to perform the conditions of the mortgage, the mortgagee merely having a lien till foreclosure: *Musser v. King*, 40 Neb. 892, 42 Am. St. Rep. 700, 59 N. W. 744; *Randall v. Persons*, 42 Neb. 607, 60 N. W. 898; *Camp v. Pollock*, 45 Neb. 771, 64 N. W. 231; *Gould v. Armgast*, 46 Neb. 897, 65 N. W. 1064; *Sanford v. Duluth etc. Co.*, 2 N. Dak. 6, 48 N. W. 434; *Soell v. Haddon*, 85 Tex. 182, 19 S. W. 1087. This view is also adopted by the Michigan courts: *Lucking v. Wesson*, 25 Mich. 443; although early decisions in that state followed the general rule: *Tannahill v. Tuttle*, 3 Mich. 104, 59 Am. Dec. 480; *Thurber v. Jewett*, 3 Mich. 295. In South Dakota ownership in mortgaged chattels after default remains in the mortgagor, the title of the mortgagee being merely a right of possession for the purpose of foreclosure: *Jencks*

v. Murphy, 15 S. Dak. 425, 89 N. W. 1121. In Voorhies v. Hennessy, 7 Wash. 243, 34 Pac. 931, the fact that the mortgagee was in possession of the property after the debts had matured was held not to amount to a forfeiture so that the legal title to the property vested in him, and was not liable to attachment for his debts.

II. Mortgagee's Right of Possession.

a. In General.—The right to take the mortgaged property into his possession, a breach of condition having occurred, is accorded the mortgagee by most of the courts: Phillips v. Hawkins, 1 Fla. 262; Swigert v. Thomas, 37 Ky. (7 Dana) 220; Spaulding v. Scanland, 43 Ky. (4 B. Mon.) 365; Brown v. Phillips, 66 Ky. (3 Bush) 656; Simpson v. McFarland, 35 Mass. (18 Pick.) 427, 29 Am. Dec. 602; Close v. Hodges, 44 Minn. 204, 46 N. W. 335; Hall v. Snowhill, 14 N. J. L. 8; Finkel v. Lepkin, 62 N. J. L. 580, 41 Atl. 718; Porter v. Parmly, 43 How. Pr. 445; Talman v. Smith, 39 Barb. 390; Lewis v. Palmer, 28 N. Y. 271; Judson v. Easton, 58 N. Y. 664; McClendon v. Wells, 20 S. C. 514; Klinkert v. Fulton etc. Co., 113 Wis. 493, 89 N. W. 507; Merchants' Nat. Bank v. McLaughlin, 2 Fed. 128.

When possession is lawfully taken by a mortgagee under his mortgage, the legal title is in him for the purpose of subjecting the property to the payment of his debt: Hammond v. Solliday, 8 Colo. 610, 9 Pac. 781. In Lathrop v. Cheney, 29 Neb. 454, 45 N. W. 617, he is held entitled to possession simply to protect his security and satisfy his mortgage; and in Thompson v. Scheid, 39 Minn. 102, 12 Am. St. Rep. 619, 38 N. W. 801, only for the purpose of foreclosure or sale under the mortgage, and not to make use of the property. This is also the law in Oregon, and where the indebtedness is not ascertained, so that there can be a foreclosure, the rule giving the right of possession does not apply: Backhaus v. Buells (Or.), 73 Pac. 342.

In Oklahoma, after default the interest of the mortgagor in the property may be divested by delivery of possession to the mortgagee, and foreclosure proceedings are not needed: Hixon v. Hubbell, 4 Okla. 224, 44 Pac. 222.

The fact that the mortgagee has other security, or that he has waived his lien on other portions of the property, will make no difference so far as his right to possession is concerned: Norris v. Hix, 74 Iowa, 524, 38 N. W. 395. Nor does an extension of time on the debt affect this right: Bowens v. Benson, 57 Mo. 26. In Bell v. Shrieve, 14 Ill. 462, a default had occurred, upon which the mortgagee took possession, but by agreement between the parties, the day of payment or sale was delayed, with a privilege in the mortgagor to use the property for a certain purpose at a fixed time. The mortgagor thereafter demanded the chattel in right of his own general property and not for the temporary use agreed upon, and it was held that the mortgagee might refuse, on that ground, to deliver possession thereof.

Demand of payment on a note after it is due is a waiver of forfeiture; but the mortgagee may still take the property into his own possession, and hold it subject to redemption: *Greene v. Dingley*, 24 Me. 131.

Where there are several notes, the mortgagee is entitled to possession of the property upon default in the payment of either note when due: *Burton v. Tannehill*, 6 Blackf. (Ind.) 470.

Possession of the mortgaged property having been taken by the holder under the mortgage, failure to sell the property will not make it wrongful: *Bradley v. Redmond*, 42 Iowa, 452.

b. Effect of a Setoff.—The right of the mortgagee to possession may be defeated by the existence of a valid setoff in favor of the mortgagor, and if the claim exceed the mortgage debt, the mortgagee will not be entitled to the possession of the property, the mortgagor pleading the setoff in an action founded on the note and mortgage: *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584.

So where the mortgagor bought a business and goodwill of the mortgagee, who agreed not to engage in such business for a certain time, and if he did to pay the former a stipulated sum, exceeding the notes given for the purchase price, as liquidated damages, which might be set off against the notes, it was held that if such agreement was broken, the mortgagee might be restrained by injunction from prosecuting an action to obtain possession of the property mortgaged after default in the payment of the notes: *Spicer v. Hoop*, 51 Ind. 365.

c. Use of Force in Obtaining Possession.—A default having occurred, the consent of the mortgagor is not necessary to enable the mortgagee to take possession: *O'Neil v. Patterson*, 52 Ill. App. 26; *Meyer Bros. etc. Co. v. Self*, 77 Mo. App. 284; and he may enter and take the property, if peacefully done: *Burns v. Campbell*, 71 Ala. 271; and such entry may be effected even in the night-time: *Satterwhite v. Kennedy*, 3 Strob. (S. C.) 457.

The law, however, will not tolerate a use of force and the mortgagee must commit no violation of the criminal law in attempting to take possession: *McClure v. Hill*, 36 Ark. 268; *Crocker v. Burns*, 13 Colo. App. 54, 56 Pac. 199; *McClendon v. Wells*, 20 S. C. 514.

In *Thornton v. Cochran*, 51 Ala. 415, the mortgagee obtained the assistance of a deputy sheriff, who entered without process and seized the mortgaged property. The court holding the mortgagee guilty of trespass, said: "When a mortgagee takes a sheriff with him, under an indemnifying bond of one thousand dollars to levy on the mortgaged property, and thereby gets possession against the consent, though without the active resistance of the mortgagor, he cannot escape from an action of trespass on the ground of a balance due him on the mortgage. He and the sheriff would both be trifling with the obedience of the citizens to the law and its officers."

There was in that case no actual force used, and it is held consistent with the general rule by considering such a taking accompanied by an officer without valid process, as being done by threats or constructive force: *Street v. Sinclair*, 71 Ala. 110. That an officer, acting as agent of the mortgagee and using force, will not afford the latter protection for such wrongful taking, see *State v. Boynton*, 75 Iowa, 753, 38 N. W. 505.

Where there is a provision in the mortgage authorizing the mortgagee to take possession on default without process and sell the property, the same rules apply, and if there is no breach of the peace, it may be taken, though against the owner's will: *Street v. Sinclair*, 71 Ala. 110. Such a provision cannot justify the use of force, and its legal effect is thus explained in *Kilpatrick v. Haley*, 66 Fed. 133, 13 C. C. A. 480, 27 U. S. App. 752: "The clause of the mortgage above quoted did not authorize the mortgagee to force an entrance into the hotel where the property was situated seize the property, and wrest it from the custody of those who were then in the peaceable possession of the same. In other words, the mortgage did not authorize the mortgagee to commit a breach of the peace in obtaining control of the mortgaged property, even though the conditions of the mortgage had been broken, and a default had thereby been created. It simply gave the mortgagee a license to enter upon the premises where the property was situated, and to remove the property therefrom in a peaceable manner. It was not competent for the parties to authorize the use of force and violence either in obtaining possession of the property or in removing it from the hotel, and it will not be presumed that the mortgagor and mortgagee intended to make such an agreement": See, also, *Gillett v. Moody* (Tex. Civ. App.), 54 S. W. 35.

As to the validity of such provisions see "Provisions in the Mortgage," II, d, herein.

d. **Provisions in the Mortgage.**—A provision in a mortgage stipulating that after default the mortgagor should deliver possession to the mortgagee adds nothing to the latter's right upon default as that is given by law: *Roberts v. Norris*, 67 Ind. 386; and where it provides that the mortgagee may enter and take the property it is considered valid: *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434; *Singer etc. Co. v. Rios* (Tex.), 71 S. W. 275; and of course he incurs no liability in acting under it: *Wedig v. San Antonio etc. Assn.* (Tex. Civ. App.), 60 S. W. 567. A provision conferring power to take and sell the property after default applies to such property only as is included within a valid description: *Solinsky v. O'Connor* (Tex. Civ. App.), 54 S. W. 935.

A provision empowering the holder of a chattel mortgage to take and sell the goods at public or private sale is also valid but this does not confer upon him a right to remove them from the county in which they are situated to another, and there dispose of them at

private sale: *Scott v. Davis*, 4 Kan. App. 488, 44 Pac. 1001. Such a clause does not render a sale by the mortgagee obligatory and upon default title becomes absolute in him at law, and a failure to sell does not revest the title in the mortgagor: *Burdick v. McVanner*, 2 Denio, 170. In *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715, 87 N. W. 544, a provision allowing the mortgagee to take possession and sell was held to empower him to take it only for the purpose of foreclosure.

Where a mortgage given on personal property to secure notes provided that if any process should be issued or judgment entered against the mortgagor the entire sum secured should become due, and the mortgagee should have the right to possession and to sell the property on five days' notice it was held that the stipulation in regard to the five days' notice applied only to the time and place of sale under the mortgage, and was not necessary in order to perfect the default: *Leadbetter v. Leadbetter*, 125 N. Y. 290, 21 Am. St. Rep. 738, 26 N. E. 265. A breach of the condition in a mortgage against the property being levied on is as effective as a default in payment and entitles the mortgagee to immediate possession: *Collins v. State*, 3 Ind. App. 542, 50 Am. St. Rep. 298, 30 N. E. 12.

A mortgagee claiming possession must show himself entitled to it by the terms of the mortgage and if it provides for possession to remain with the mortgagor till default, he must show a default: *Fickes v. Manchester*, 43 Ill. 379. When no time is mentioned in the mortgage, there seems to be a conflict as to when it is due. In *Ashmead v. Kellogg*, 23 Conn. 70, the court held that in such a case it was to be deemed payable on demand, and until it had been made the mortgagee was not entitled to possession. In *Howland v. Willett*, 5 N. Y. Super. Ct. (3 Sand.) 607, however, it was held payable immediately and no demand was necessary before proceeding on it.

e. Sureties as Mortgagees.—In some cases, mortgages are given to sureties of the mortgagor to indemnify them, and where the instrument provides that if the debt be not paid by maturity the sureties shall have possession, they are entitled thereto, they having paid the debt of the principal: *Mills v. Malott*, 43 Ind. 248; and where the mortgage provided that the surety should be entitled to possession if the debt were not paid when due, such payment by the surety was held not necessary to allow him to have the right of possession: *Mattingly v. Paul*, 88 Ind. 95; and, without having suffered by reason of his suretyship, he may possess himself of the chattel and appropriate it to the indebtedness of the mortgagor, but he must take possession, or it will become liable to execution against the mortgagor: *Dunlap v. Epler*, 88 Ill. 82.

III. Where Mortgage is Due upon a Contingency.

Where a clause is inserted in a chattel mortgage to the effect that upon the happening of a certain contingency the notes secured, though not due by their terms, should become due and payable and

the mortgagee might elect to take possession of the property, he is not forced to take possession. Speaking of such a clause, the court, in *Barbour v. White*, 37 Ill. 164, said: "We are of opinion that the reasonable construction of this provision, when taken in all its parts, is, not that the notes shall become absolutely due, and the mortgagee compelled to take possession, in order to preserve his lien, but that he has the election to treat the notes as due, and take possession, or let them stand upon their original terms, as he may desire. The clause is, so far as the mortgagor is concerned, in the nature of a forfeiture, and to hold that the mortgagee must declare the forfeiture or lose his security, would be an extremely harsh rule for the debtor, and an onerous one for the creditor. . . . The clause was inserted in the mortgage merely to give the mortgagee additional security, and if he does not deem it necessary to avail himself of his privilege of claiming payment of his notes sooner than they are due by their face, no other person is injured or has a right of complaint." See to the same effect, *Wilson v. Rountree*, 72 Ill. 570.

IV. Where Given for Different Debts.

Where a mortgage is given for different debts maturing at different times, the mortgagee need not wait till they are all due before taking possession: *McConnell v. Scott*, 67 Ill. 274. He may, however, wait till the last note is due without forfeiting his lien: *Chapin v. Whitesett*, 3 Colo. 315. "The contrary rule would greatly impair the value of chattel mortgages as a security, as, if the mortgagee were required to take possession and sell on default in the payment of the first installment, he would lose the benefit of his security for the subsequent installments in all cases where the property was incapable of division, and the mortgage failed to provide that the entire debt should become due on default in the payment of any part. The rights of all parties will be best guarded by requiring of subsequent encumbrancers to act upon the knowledge that the elder mortgagee has the right to delay action until the entire debt secured by the mortgage falls due, provided it falls due within the statutory limitation": *Barbour v. White*, 37 Ill. 164.

That a default in the payment of one installment gives the mortgagee as perfect a title as failure to pay the entire debt, see *Willis v. O'Brien*, 35 N. Y. Super. Ct. (3 Jones & S.) 536; *Halstead v. Swartz*, 46 How. Pr. 289, 1 Thomp. & C. 559.

V. Effect of Mortgagor's Death.

Where a chattel mortgage provided that upon default the mortgagee might take possession of the property, either preliminary to foreclosure or to preserve it, the mortgagor's death does not defeat the right of the mortgagee to possession, and is superior to the rights of the administrator: *Purdin v. Archer*, 4 S. Dak. 54, 54 N. W. 1043. See, also, *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344.

VI. Mortgagor as Mortgagee's Bailee After Default.

After condition broken, the mortgagor in possession of the property is usually considered a mere bailee of the mortgagee: *Swift v. Hart*, 12 Barb. 530. So where the mortgagee returns the property, the mortgagor giving a forthcoming bond conditioned on its being produced for sale on a fixed day, he acts as the former's bailee: *Moody v. Haselden*, 1 S. C. 129; and if, after default, he denies the mortgagee's title, asserting an adverse title in himself, this is equivalent to a conversion of the property he being only a bailee thereof: *Roach v. St. Louis Type etc. Co.*, 21 Mo. App. 118.

In *Baumann v. Post*, 12 N. Y. Supp. 213, 16 Daly, 385, 26 Abb. N. C. 134, it was held that by merely allowing the goods to remain in the mortgagor's possession after default the mortgagee did not thereby make him his agent or bailee, so that he could bind him for a warehouseman's lien, especially as the warehouseman did not know of the mortgage or how long the mortgagor had been in possession.

VII. Rights of Mortgagee as Against Levying Officer of Mortgagor.

The rights of a levying officer and of a mortgagee to the mortgaged property after default depend, to a certain extent, upon what title the mortgagee is considered as having acquired by a breach of condition. In *Butler v. Lee*, 54 Miss. 476, the court said: "After breach of the condition, the mortgagee or trustee is entitled to the possession of the property, in order to make available his security. If he is entitled to possession no one can have the right to withhold it from him. . . . The right of the mortgagee or trustee, after breach of the condition of the mortgage or deed of trust, to the possession of the property, and of the sheriff to it by virtue of process, cannot coexist. One must be superior to the other. Manifestly the claim under the execution issued upon a judgment junior to the rights of the trustee or mortgagee must yield to his superior rights, or it would occur that the paramount right must yield precedence to the subordinate": See, in accord, *Ament v. Greer*, 37 Kan. 648, 16 Pac. 102; *Willis v. O'Brien*, 35 N. Y. Super. Ct. (3 Jones & S.) 536; *Saxton v. Williams*, 15 Wis. 292.

In *McIsaacs v. Hobbs*, 38 Ky. (8 Dana) 268 it is said that if the mortgagee would have a right by replevin to take the property from an officer levying execution against the mortgagor, the right is subject to the limitation that the property is still subject, both before and after judgment, to be taken for the purpose of selling the mortgagor's interest.

In Michigan a mortgagor's interest may be levied on and possession taken even as against the mortgagee, although the debt is past due, if it is not foreclosed: *Cary v. Hewitt*, 26 Mich. 228. And see *Nelson v. Ferris*, 30 Mich. 497. And in Minnesota an officer levying execution on the mortgagor's interest in the property, for

the purpose of sale, after condition broken, but before the mortgagee had taken possession, has the right of possession, and may detain them till brought to sale, for the time prescribed by law: *Barber v. Amundsen*, 52 Minn. 358, 54 N. W. 733.

VIII. Remedies of Mortgagee.

a. Absolute Owner for Purposes of Suit.—After a breach of condition, a mortgagee has a right of action at law for the possession of the property, if the mortgagor fails or refuses to surrender it to him: *Gilchrist v. Patterson*, 18 Ark. 575; and he is entitled to the same remedy against the mortgagor that he would be as against any other person: *Kiser v. Blanton*, 123 N. C. 400, 31 S. E. 878. His rights of recovery against anyone unlawfully converting the property are just as perfect as though he was the absolute owner, the only difference being that, as against persons claiming under the mortgagor, his right to damages would be limited to the amount due on his mortgage: *Klinkert v. Fulton etc. Co.*, 113 Wis. 493, 89 N. W. 507.

b. Replevin.—Having the right to possession he may maintain replevin: *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434; *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636; *Meyer Bros. etc. Co. v. Self*, 77 Mo. App. 284; *Western Realty Co. v. Musser* (Mo. App.), 71 S. W. 100; *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980; and if taken from the possession of the mortgagor, may bring either replevin or trespass: *Dane v. Mallory*, 16 Barb. 46. An allegation that he is the owner of the property is supported by showing a mortgage thereof and a default in its condition: *Crocker v. Burns*, 13 Colo. App. 54, 56 Pac. 199. Where the mortgage provides that the mortgagor shall have possession until the debt becomes due, there is no wrongful taking, and a detention by the former after the maturity of the debt does not become unlawful, so as to make him a wrongdoer until a demand has been made for the property: *Roberts v. Norris*, 67 Ind. 386.

In an action of replevin for mortgaged chattels, after default, no tender of the amount paid thereon is necessary, as it does not come within the purview of the statutes requiring such tender in the case of conditional sales, title to remain in the vendor until full payment: *Wurmser v. Sivey*, 52 Mo. App. 424.

It is no defense to an action of replevin that a portion of the indebtedness was paid before suit, but proof that the entire debt was discharged presents a good defense; but a setoff in an action of this character is no answer thereto, whatever may be its force in an action to foreclose: *Hudson v. Snipes*, 40 Ark. 75. Nor is a tender by the mortgagor of any avail in a replevin suit, as the mortgagor's right after condition broken lies only in equity: *Jackson v. Cunningham*, 28 Mo. App. 354. The mortgagee will not be heard to plead fraud to delay or hinder other creditors, where he is sued in replevin by the mortgagee, as he is estopped by his own act from so doing: *Sink v. Loflin*, 76 Mo. App. 463.

c. Detinue.—He may also maintain detinue, after default: *Mervine v. White*, 50 Ala. 388; *Brown v. Phillips*, 66 Ky. (3 Bush) 656; and this action was held to lie where the property was mortgaged to indemnify the mortgagee as surety for the mortgagor, where the debt became due and the latter failed to pay: *Spaulding v. Scanland*, 43 Ky. (4 B. Mon.) 365.

d. Trover.—Trover will also lie against anyone converting the property after condition broken: *Close v. Hodges*, 44 Minn. 204, 46 N. W. 335; *Freeman v. Freeman*, 17 N. J. Eq. 44; and a wrongful refusal to surrender the goods by the mortgagor is a conversion: *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344. Where a third person takes the property from the mortgagor, the instrument providing that on default the mortgagee might take possession, and that while in the mortgagor's possession he should be deemed his agent, he is liable for a conversion, and no demand is necessary, as he did not come into possession lawfully: *Keefer v. Greene*, 62 Hun, 618, 16 N. Y. Supp. 498.

IX. Effect of Tender by Mortgagor.

The authorities uniformly hold that, after default, a tender by the mortgagor of the amount due is not sufficient, in law, to revest the title in him and the mortgagee is under no obligation to accept it, and restore the property: *Blain v. Foster*, 33 Ill. App. 297; *Dane v. Mallory*, 16 Barb. 46; *Hulsen v. Walter*, 34 How. Pr. 385; *Porter v. Parmlly*, 43 How. Pr. 445; *McClendon v. Wells*, 20 S. C. 514. If it did have that effect there would be no necessity for the mortgagor to invoke the aid of a court of equity by a bill to redeem, as he would have a complete remedy at law: *Reese v. Lyon*, 20 S. C. 17. Nor is a tender of the proceeds of property wrongfully sold by the mortgagor a waiver of the mortgagee's rights: *Holloway v. Arnold*, 92 Mo. 293, 5 S. W. 277.

An acceptance by the mortgagee of such tender is a waiver of the forfeiture, and the legal title revests in the mortgagor: *Jackson v. Cunningham*, 28 Mo. App. 354; *Charter v. Stevens*, 3 Denio, 33, 45 Am. Dec. 444. In equity, in order to discharge a mortgage the tender of the amount due must be kept good: *Blain v. Foster*, 33 Ill. App. 297.

X. Partial Payments.

Partial payments made previous to the maturity of the debt do not affect the mortgagee's right to the possession of the entire property, in the absence of a provision in the instrument to that effect: *Burns v. Campbell*, 71 Ala. 271. A partial payment made after default, however, and accepted by the mortgagee is to be regarded as a waiver by the latter of his strict legal rights, and the rights of the parties are the same as if payment on the indebtedness had been extended: *Winchester v. Ball*, 54 Me. 558.

XI. Mortgagee's Right of Foreclosure and Sale.

As before remarked, the mortgagor has an equity of redemption after default, and the mortgagee may resort to a court of equity to foreclose it: *Charter v. Stevens*, 3 Denio, 33, 45 Am. Dec. 444. His title, however, being absolute in law, he is not bound to do so: *Hulsen v. Walter*, 34 How. Pr. 385; *Nichols v. Webster*, 1 Chand. 203, 2 Pinn. (Wis.) 234. In *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636, it is said, speaking of a mortgagee: "After taking possession he was at liberty to convert said goods into cash by sale or by foreclosure in equity, and if found insufficient to pay the amount due him, to resort to the mortgagor for the deficiency. But it was his duty to exercise the right of sale or foreclosure within a reasonable time after taking possession or not at all. He was not bound to exercise that right, but could hold the property and treat it as his own, subject only to the mortgagor's right of redemption in equity. But his election to hold the property must be treated as a satisfaction of his debt, at least to the extent of its value at the time he took it into his possession: *Case v. Boughton*, 11 Wend. 106; *Stoddard v. Denison*, 38 How. Pr. 296; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Ex parte Haake*, 2 Saw. 231, Fed. Cas. No. 5883; *Jones on Chattel Mortgages*, sec. 773." See, also, *Porter v. Parmly*, 43 How. Prac. 445. The whole title can be divested by redemption only by payment of the whole debt: *Halstead v. Swartz*, 46 How. Pr. 289, 1 Thomp. & C. 559.

A sale with the consent of the mortgagor is equivalent to a formal foreclosure of the equity of redemption: *Talman v. Smith*, 39 Barb. 390; *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947. That foreclosure proceedings are safer and more advisable, see *Freeman v. Freeman*, 17 N. J. Eq. 44.

The mortgagee is liable to account to the mortgagor for the surplus remaining after the debt and all reasonable costs have been paid: *Root v. Davis*, 51 Ohio St. 29, 36 N. E. 669; *Flanders v. Thomas*, 12 Wis. 410.

XII. Rights Between Mortgagees.

When a mortgage is given to secure debts owing to several different parties, and a default occurs, the mortgagees become tenants in common of the property, neither having a greater right to it than the others, but all equally entitled to the possession thereof: *Melin v. Reynolds*, 32 Minn. 52, 19 N. W. 81; *Tyler v. Taylor*, 8 Barb. 585; *Trustees etc. v. Williams*, 100 Wis. 223, 69 Am. St. Rep. 912, 75 N. W. 954.

Where, after condition of a first mortgage is broken, a second mortgage is issued to another mortgagee, the latter cannot sue a purchaser of the first mortgagee after default for claim and delivery. In executing a second mortgage after condition broken, nothing but an equity of redemption is conveyed: *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947, where the court say: "It is stated in *Jones on Chattel Mortgages*, section 497, that 'A second mortgagee is entitled to pos-

session according to the terms of his mortgage against all the world, except the first mortgagee, whose debt remains unpaid, and he may maintain an action for possession as against anyone else.' To sustain this, the author cites *Newman v. Tymeson*, 13 Wis. 172, 80 Am. Dec. 735; *Treat v. Gilmore*, 49 Me. 34. This may be conceded to be sound, provided the mortgagor at the time of giving the second mortgage had any legal interest which he could convey; but, as shown above, at the time of the execution of the second mortgage, *Jenkins* (the mortgagor) had neither title nor right of possession, and could convey only his right to redeem, a mere equity. . . . It would tend to a multiplicity of suits to allow the second mortgagee, under these circumstances, to recover possession of the property from the mortgagor, then allow, as would inevitably have to be done, the first mortgagee to recover possession of the second mortgagee, at last compelling the second mortgagee to bring his suit in equity to redeem, or for an accounting, which he should have resorted to in the first instance: See the case of *Ring v. Neale*, 114 Mass. 111, 19 Am. Rep. 316, which supports the view of this court."

In *Finkel v. Lepkin*, 62 N. J. L. 580, 41 Atl. 718, it is held that, his debt being past due, a second mortgagee may take possession of the property and sell the mortgagor's interest therein, the purchaser, in such a case, standing in the place of the mortgagor, holding them subject to the senior mortgage, and the senior mortgagee's right to seize the property and sell it upon the maturity of his debt.

Where a sheriff holds property for the purpose of foreclosing a senior mortgage thereon, a junior mortgagee, offering to pay the debt and costs, is entitled to possession, the offer being rejected as insufficient: *De Luce v. Root*, 12 S. Dak. 141, 80 N. W. 181.

Where a mortgagee sues a mortgagor for possession of the property, default having been made, subsequent mortgagees who intervene therein have no right either to a judgment on their claims or the prior mortgagee's. "Whatever rights the interveners had were those of second or subsequent mortgagees of personal property after the title thereto had by default become vested in the prior lienors. This right is entirely analogous to that enjoyed by the mortgagor, which is simply the right of redemption, or possibly under some circumstances the right to enforce a claim against any surplus, or to attack the sale because of some fraud or wrong committed in the enforcement of the prior mortgagee's rights": *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525.

XIII. The Principal Case Contrasted with Former Ohio Decisions.

Attention has been called to the cases of *Lindemann v. Ingham*, 36 Ohio St. 1, decided in 1880, and *Ingham v. Lindemann*, 37 Ohio St. 218, decided in the following year, which deal with the rights of a chattel mortgagee under an Ohio statute regulating the administration of assignments for the benefit of creditors.

The facts are plain: the assignors mortgaged certain of their personal property to secure four promissory notes, agreeing that in case of default made either in payment thereof or in other matters affecting the property, the mortgagees might take possession, or foreclose the mortgage. Default was made. Thereafter the mortgagors made an assignment for the benefit of creditors, conveying the mortgaged property, among other things, thereby. The mortgagees demanded possession thereof from the assignee, who refused to deliver it, but instead sold the goods. An action was then instituted for conversion, but which the court held could not be maintained.

These decisions do not, in so many words, attempt to enunciate a doctrine at variance with that set forth in the principal case. On the contrary, they admit that the mortgagee is the owner at law, after condition broken, no matter what he may be in equity. Speaking of these cases, the same court in a later decision said: "It was not denied that, the condition of the mortgage being broken, the legal title to the property was in the mortgagee, and all that was left in the mortgagor and therefore all that passed to the assignee, was an equity of redemption, or an equitable interest to the extent of what remained after the payment of the mortgage": *Saylor v. Simpson*, 45 Ohio St. 141, 12 N. E. 181.

The effect of these decisions, however, appears to be contrary to the principal case, for the mere equitable right was considered strong enough to draw with it the right to possession, and that in the face of the stipulation giving the mortgagees such right upon default.

The court says, in *Lindemann v. Ingham*, 36 Ohio St. 1: "It is said, however, that a mortgagee, after condition broken, has no lien upon the property, as he is the owner, and hence that the statutory provision to which reference has been made does not apply. That the mortgagee is the owner in the sense that there is no interest in the mortgagor remaining after condition broken, which the mortgagor, his creditor, or assignee, can assert, is a proposition which finds little support elsewhere, and, as we have seen, none in Ohio." The interpretation given by the court really amounts to this: that the mortgagee is not the owner at all, either at law or in equity, for if he were, one having a mere equitable right to any surplus remaining could not destroy or transfer his right of possession.

It is true that a sale may be had free from liens. In *Sutherland v. Lake Superior etc. Co.*, Fed. Cas. No. 13,643, 9 Nat. Bank Reg. 298, 1 Cent. L. J. 127, it is said: "The power exercised by the court of bankruptcy to sell free from encumbrances, is but an instance of a similar one familiar to the court of chancery. We should, wholly irrespective of the bankruptcy law, if the facts ultimately presented warranted it, sell the entire estate free from encumbrances; it may appear that in no other way can the various interests in the equity of redemption be in the slightest degree protected."

There, however, no default had occurred, the interest of the mortgagee not having ripened into a right of possession. Where it has

so ripened, and he becomes the legal owner, it is difficult to perceive on what theory a court of justice can take away the property of one man to protect that of another.

In *Foster v. Amres*, 1 Low. 313, Fed. Cas. No. 4965, this same right of sale is allowed, although the mortgagee is entitled to possession. In that case, however, there was a dispute as to the validity of the mortgage. The court added: "Of course, such a sale ought not to be ordered when the mortgagee's title is admitted to be valid, and the sale will injure him, as where there is no market value, or not value enough for his own security."

The question of constitutionality does not appear to have been raised in any of the cases, but the construction given by the court in the two Ohio cases under discussion approaches dangerously near the line of unconstitutionality, as taking property without due process of law, for the right of possession is a valuable right, which should be protected.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

STATE v. LETOURNEAU.

[24 R. I. 3, 51 Atl. 1048.]

CRIMINAL LAW—Evidence of Other Crimes.—Under an indictment charging a person with obtaining money under false pretenses in selling certain goods, evidence of other sales of the same kind of goods made after the finding of such indictment is inadmissible. (p. 697.)

C. F. Stearns, attorney general, for the state.

F. P. Owen, for the defendant.

4 **TILLINGHAST, J.** The defendant was indicted for, and convicted of, the offense of obtaining money under false pretenses in writing, and the case is now before us upon his petition for a new trial upon the grounds that the verdict was against the evidence and that the trial court erred in certain of its rulings.

The false pretense set out in the indictment is that the defendant, "with the intent to defraud one William O. Blanding, did falsely pretend in writing that seven hundred and twenty boxes of pills were Dr. Coderre's Red Pills for Pale and Weak Women, prepared by the Franco-American Chemical Company, by means of labels pasted upon each of said boxes [a copy of one of said labels being attached to and made part of the indictment], whereas, in truth and in fact, the said seven hundred and twenty boxes of pills were not then and there Dr. Coderre's Red Pills prepared by said company, as he, the said Joseph A. Letourneau, then and there well knew; by means of which said false pretenses the said defendant then and there

designedly, and with intent to defraud the said William O. Blanding, did obtain from him a good and valid check and order for the payment of money to the amount of one hundred and ninety-seven dollars and fifty cents."

In addition to the direct evidence offered by the state in support of the particular charge contained in the indictment, the attorney general was permitted, against the objection of the defendant, to introduce evidence of other sales of said pills to other persons than said Blanding at various times prior to the finding of the indictment. The evidence was held to be admissible by the trial court, for the purpose of showing guilty knowledge on the part of the defendant.

Evidence was also admitted, against the defendant's objection, to prove sale of said pills by the defendant in May and June subsequent to the finding of said indictment, to the admission of which evidence the defendant duly excepted.

⁵ While we have grave doubts as to the admissibility of the evidence of sales which were made prior to the finding of the indictment, as each of such sales would constitute a separate and distinct offense under the statute, it is certainly clear that no sale made subsequent to the finding of the indictment was in any way relevant thereto. And as such testimony was doubtless prejudicial to the defendant, the admission thereof is sufficient ground for the granting of a new trial.

It is evident from the record that the evidence of said subsequent sales was admitted by the trial court upon a misapprehension as to the time of the finding of the indictment—as the court said, when objection was made thereto by the defendant's counsel: "If it was after the third of this last month.—June—that is not proper, because it is not covered by the indictment." The indictment shows, however, that it was found on the 4th of March, 1901, and not in June of that year, as the court evidently supposed it was.

A number of other exceptions were taken by defendant to the rulings of the trial court relating to the admissibility of testimony and to requests to charge the jury; but as there must be a new trial, and as it is doubtful whether the points raised will be material hereafter, we do not deem it necessary to consider them.

Petition for new trial granted.

The Admissibility of Evidence of other crimes against the defendant in a criminal prosecution is the subject of a monographic note to Strong v. State, 44 Am. Rep. 299-308. Ordinarily, evidence of a

crime different from the one charged is not admissible, except for the purpose of showing motive, interest, or guilty knowledge: *People v. Greenwall*, 108 N. Y. 296, 2 Am. St. Rep. 415, 15 N. E. 404; *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *Fowle v. Child*, 164 Mass. 210, 49 Am. St. Rep. 451, 41 N. E. 291; *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; *Thornley v. State*, 36 Tex. Cr. Rep. 118, 61 Am. St. Rep. 836, 34 S. W. 264; *State v. Brady*, 100 Iowa, 191, 62 Am. St. Rep. 560, 69 N. W. 290; *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62. In prosecutions for obtaining money or property by false pretenses, evidence of other similar pretenses is competent to show guilty knowledge or intent: See the monographic note to *Barton v. People*, 25 Am. St. Rep. 387; *Du Bois v. People*, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658.

LEONARD v. STATE MUTUAL LIFE ASSURANCE COMPANY.

[24 R. I. 7, 51 Atl. 1049.]

INSURANCE, LIFE—Evidence.—The falsity of answers in an application for life insurance may be shown under the general issue. (p. 699.)

INSURANCE, LIFE—Medical Examiner as Agent for Insurer. If a life insurance company requires its medical examiner to put the questions and fill out the answers in an application in his own handwriting, he becomes the agent of the company in this respect, and if he receives correct answers and takes the signature of the applicant before such answers are recorded, this must be regarded as the action of the insurer, and not within the rule that the writer of the application is the agent of the insured. (pp. 699, 700.)

INSURANCE, LIFE—Medical Examiner as Agent.—A medical examiner of an insurance company required by it to fill out medical certificates is not the agent of the company for anything more than such certificates. Notice to him of anything not called for by his certificate is not notice to the insurer, and he has no authority to waive an answer or give advice binding on the insurer to write an answer as it is written in the application for insurance. (p. 700.)

INSURANCE, LIFE—Warranties.—The answers of an applicant for life insurance are warranties, and their falsity and not his fraud is the basis of liability thereon. (p. 701.)

I. Champlin and H. J. Carroll, for the plaintiff.

E. D. Bassett, for the defendant.

§ STINESS, C. J. It is not necessary to consider the exceptions which relate to the pleadings in this case, because the special pleas themselves were not necessary.

The long-settled rule in this state is that statements in an application for insurance, made as of the applicant's own knowl-

edge, upon which the contract is based, are warranties, the burden of proving which are upon the plaintiff: *Wilson v. Hampden Ins. Co.*, 4 R. I. 159; *Lyons v. Providence Ins. Co.*, 14 R. I. 109, 51 Am. Rep. 364; *Sweeney v. Metropolitan Ins. Co.*, 19 R. I. 171, 61 Am. St. Rep. 751, 36 Atl. 9.

In the latter case it was said that they may be sustained, *prima facie*, by the presumption of truth which attaches to a man's solemn acts and declarations in the course of a contract; but, having been made a part of the contract, the plaintiff must sustain them if they are attacked.

It follows from this that a denial of the truth of the statement does not require a special plea, for they are a part of his case. Special pleas are never mere denials of necessary averments in the declaration, but they are used where the averments may be true and the plaintiff have a color of action, but some other fact exists which will defeat it. Familiar illustrations are pleas of the statute of limitations, discharge in bankruptcy, license, justification, and the like.

The defendant was therefore entitled to show, under the general issue, that certain answers were untrue, and to these the plaintiff would reply. This was done by special pleas, but as the result was right, the mode of reaching it and the questions of law raised thereby are of no consequence.

It is also a settled rule in this state that one who is only authorized to solicit insurance is not the agent of the company in making the application, and that if he takes part in making the application he is in that respect the agent of the applicant and not of the company: *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Reed v. Equitable etc. Ins. Co.*, 17 R. I. 785, 24 Atl. 833.

Two statements in the application are set up by the defense as untrue: one in omitting to state that two sisters had died of phthisis, and one in stating that the insured did not contemplate other insurance.

The statement in regard to the death of the sisters occurred in the certificate of the medical examiner, and, as in *Leonard v. New England Ins. Co.*, 22 R. I. 519, 48 Atl. 808, the company required the medical examiner to put the questions and fill out the answers in his own handwriting, thereby making the examiner the agent of the company in this respect. Hence, if this agent received correct answers to the questions and took the signature of the applicant before the answers were recorded all this must be regarded as the action of the company and not within the rule, above stated, that the writer of the application

is the agent of the insured. Upon this ground there was no error.

The second statement, that he did not contemplate other insurance, is simply a question of fact. The jury was correctly instructed that it must find the answer to be true in order to return a verdict for the plaintiff.

The insurance in this company was three thousand five hundred dollars, and at the same time Leonard applied for and afterward received insurance to an equal amount in another company, the same doctor examining for both companies. The statement about other insurance was not a part of the medical certificate, but of the application filled out by the solicitor of the insurance. The latter testified that when he came to this question he asked the doctor if it would "make any difference," and he said "No." It is not at all clear what this means, but the argument is that as the examination for both companies took place at the same time, and this answer was made in the presence of the medical examiner, that, therefore, the insured supposed it was all one transaction, and that the company had notice of the fact, notwithstanding the answer.

But evidently the insured knew that there were two applications, and the doctor was not the agent of the company for anything more than the medical certificate. Notice to him, therefore, of anything not called for by his certificate was not notice to the company. He had no authority to ¹⁰ waive the answer or to give advice binding on the company to write the answer as it was written. Indeed, it is almost incredible that anybody, without an intent to deceive, could have answered the very simple question, "Is any application for insurance in any other company now pending or contemplated?" "No," upon the reason that the application was made at that time instead of some other time. At no time could the insured be so certain that he contemplated other insurance as then, while he was being examined for it. The answer was untrue, and the insured was not misled in making it by anyone representing the company in that respect.

The plaintiff claims, however, that the answer does not avoid the policy, because it was innocently made and the real fact was known to the company's agent. The reply to this claim is that falsity, not fraud, is the basis of liability on a warranty: *Ingraham v. Union R. R. Co.*, 19 R. I. 356, 33 Atl. 875; *Fogarty v. Barnes*, 16 R. I. 627, 18 Atl. 982; *Place v. Merrill*, 14 R. I. 578.

The cases cited by the plaintiff follow the rule that the one who takes the application is the agent of the company, which is not the rule of this state, and the medical examiner is made the agent of the company only as to that part of the application which he is required to write.

The answer being untrue, and being a part of the contract and relating to a matter within the knowledge of the applicant, it must be regarded as a material misstatement which avoids the contract. This being conclusive of the rights of the parties, judgment must be for the defendant.

Petition for new trial granted and case remitted to common pleas division with instructions to enter judgment for the defendant.

If Insurance Agents make out applications incorrectly, when the applicant has stated the facts correctly, the insurance company will be estopped to urge the falseness of the answers as written by the agent. He is the representative of the insurer, and not of the insured: See the monographic notes to *Clark v. Union etc. Ins. Co.*, 77 Am. Dec. 774; *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 232, 233; and the subsequent cases of *Triple Link etc. Assn. v. Williams*, 121 Ala. 133, 77 Am. St. Rep. 34, 26 South. 19; *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 54 Am. St. Rep. 506, 38 N. E. 417. And this rule applies to medical examiners. False answers inserted by them, when the applicant answers truthfully, do not invalidate the insurance, although it is stipulated in the application that the examiner is the agent of the insured: *Royal Neighbors v. Roman*, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 264; *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625, 62 N. E. 763. Compare *O'Rourke v. Hancock etc. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643, 50 Atl. 834.

MAINZ v. LEDERER.

[24 R. I. 23, 51 Atl. 1044.]

ATTACHMENT Will not Lie in an action for breach of promise of marriage. (p. 703.)

ATTACHMENT.—To Warrant an Attachment the cause of action must be based upon a contract where the damages, although they may be unliquidated, are yet susceptible of estimation and determination under the ordinary and well-understood commercial and business rules applying to contracts proper. (p. 706.)

F. P. Owen, for the plaintiff.

Miller & Carroll, for the defendant.

23 TILLINGHAST, J. The only material facts in this case, which is an action of assumpsit for breach of promise of marriage, are as follows: The original writ was issued on October 12, 1897, and was a writ of summons. Upon the trial of the case in the common pleas division, in October, 1898, a verdict was rendered in favor of the plaintiff, and her damages were assessed in the sum of twelve thousand five hundred dollars. Thereafterward, on the twenty-fourth day of July, 1899, and pending **24** the defendant's petition for a new trial, the plaintiff sued out of said common pleas division a writ of mesne process which commanded the attachment of the goods and chattels and real estate of the defendant, to the value of fifty thousand dollars, which writ was served by attaching said real estate of the defendant in the city of Providence. The defendant thereupon filed a motion in the common pleas division that said writ of attachment be dismissed and that the service thereof be set aside, which motion was duly heard by said division, and on the twenty-seventh day of April, 1901, was denied. The defendant duly excepted to the ruling, and the case is now before us upon the question as to whether it was correct.

The grounds of the defendant's objection to the ruling complained of are, substantially, (1) that a writ of mesne process cannot be a writ of attachment unless the action could have been commenced by a writ of attachment; (2) that the General Laws of Rhode Island do not authorize writs of attachment to be issued in actions for breach of promise of marriage; (3) that the plaintiff in an action for breach of promise of marriage cannot properly make the affidavit required by

the General Laws to be made before a writ of attachment can issue; and (4) that the issuing of said writ is an abuse of the process of the court and hence should be dismissed, the service thereof set aside and the attachment made thereon dissolved.

General Laws of Rhode Island, caption 252, section 14, provides as follows: "An original writ commanding the attachment of the real or personal estate of the defendant, including his personal estate in the hands or possession of any person, co-partnership or corporation as the trustee of the defendant and his stock or shares in any banking association or other incorporated company, may be issued from the common pleas division of the supreme court or any district court, whenever the plaintiff in the action to be commenced by such writ, his agent or attorney, shall make affidavit, to be indorsed thereon or annexed thereto, that the plaintiff has a just claim against the defendant that is due, upon which the plaintiff expects to ²⁵ recover in such action a sum sufficient to give jurisdiction to the court to which such writ is returnable."

Section 17 of the same chapter provides that: "The plaintiff in any action may, as often as may be necessary, at any time before final judgment in such action, sue out of the court in which the action shall have been commenced, a writ of mesne process, commanding the attachment of the real or personal estate of the defendant, etc., . . . provided, the plaintiff, his agent or attorney, shall make affidavit to be indorsed on or annexed to said writ, setting forth facts which would authorize an attachment . . . upon an original writ." The plaintiff's attorney made the statutory affidavit on said writ of mesne process, and it was then served as aforesaid.

It will at once be seen from the foregoing statement of facts, that the only question which is presented for our decision is whether an attachment can legally be made in an action for breach of promise of marriage. If it can be, then the ruling complained of was correct and should be sustained; but if it cannot be, then the ruling was erroneous and should be reversed.

Contrary to our first impressions, we are of the opinion, after careful and diligent consideration of the question raised, that under our statute an attachment will not lie in an action of this sort. True, it is an action based on contract, but the contract is wholly unlike any other in that the damages for a breach thereof are not measured by any commercial or business standard, but are governed almost exclusively by those rules which are applicable to tort actions, and rest almost abso-

lutely in the judgment of the jury. Thus, the law allows punitive or vindictive damages to be assessed in such cases: *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561. And all the circumstances attending the breach before, at the time, and after, may be given in evidence in aggravation of damages: *Baldy v. Stratton*, 11 Pa. St. 316; *Tubbs v. Van Kleeck*, 12 Ill. 446; *Reed v. Clark*, 47 Cal. 194; 1 *Wait's Actions and Defenses*, 727.

²⁶ Again, the plaintiff may, in such an action, for the purpose of enhancing her damages, prove that she announced the fact of her engagement to her friends and invited them to attend the wedding: *Reed v. Clark*, 47 Cal. 194. So the length of time a marriage engagement existed has been held to be a proper element of damage for the breach thereof: *Grant v. Willey*, 101 Mass. 356. A defense to such an action that the plaintiff is unchaste, if not established at the trial, may be considered by the jury in aggravation of damages: *Southard v. Rexford*, 6 Cow. 654; *Davis v. Slagle*, 27 Mo. 600. Seduction may also be proved in aggravation of damages: *Mainz v. Lederer*, 21 R. I. 370, 43 Atl. 876.

There may also be given in evidence in such a case, and the jury may take into consideration in estimating the damages, as said by this court in *Drury v. Merrill*, 20 R. I. 2, 36 Atl. 835, "the defendant's wealth, his social position, the length of the engagement, the depth of the plaintiff's devotion, her lack of independent means, her mortification and injured feelings and affections, her altered social position in relation to her home and family, due to his conduct, and her expenses in preparation for the marriage."

These and many other illustrations which might be given show that while the action is based upon contract, it is really an action by itself and partakes almost entirely of the nature of a tort in everything that pertains to the real object thereof.

We have been unable to find many cases bearing directly upon the question involved, but all of the cases which have come to our knowledge, with one exception, sustain the general position taken by the defendant's counsel. Thus, in *Maxwell v. McBrayer*, 61 N. C. 527, the court quashed the writ of attachment in a case of this sort. *Battle, J.*, in delivering the opinion of the court, said: "The damages which a jury might assess for the breach of such a contract are quite as uncertain as those which might be given for a trespass for an assault and

battery on the person, and the amount of them as a debt can no more be sworn to by the ²⁷ plaintiff, his attorney or agent, in the one case than in the other."

In *Conley v. Creighton* (Ohio), 5 Am. Law Rec. 424, the court said: "The action for breach of promise of marriage, though nominally an action founded on the breach of a contract, presents a very strong exception to the general rules which govern contracts. The action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to include the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of compensation by any precise rule, and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance: *Sedgwick on Damages*, 455. The very object of the action is to fix the amount of the claim, and the amount can never be known in any other way. How, then, can a plaintiff swear to any? How much shall be set down to the account of injured feelings, and affections, and wounded pride, and how much as the value of the lost marriage? I confess myself as being wholly unable to regard such a claim as a demand within the meaning of the statute." This case was afterward affirmed by the superior court of Cincinnati, general term: 2 Week. Law Bull. 379.

In *Kneeland on Attachment*, the author, in speaking of cases of this sort, says: "There are a class of actions arising nominally on contract that partake, nevertheless, of the nature of personal tort, and should be classed with that family. Principal in this class is the action for the breach of promise of marriage. The contract is not in any sense a pecuniary one, although the only remedy for the breach allowed by the law is money. The measure of damages, however, is governed by the circumstances of each particular case, and is entirely in the discretion of the jury the same as in ordinary actions for personal tort. Both the nature of the action and the rule of damages exclude the right of attachment in such actions, although they arise on contract and are for the recovery of money only."

²⁸ *Shinn on Attachment*, volume 1, section 10, takes substantially the same view, and says that, "unless an attachment for demands arising *ex delicto* is also permitted attachment for a breach of contract of marriage will generally be denied, and if an attachment has issued in such case, it will be set

aside on motion." In support of this statement the author cites the case of *Barnes v. Buck*, 1 Lans. (N. Y.) 268, which is a very well-reasoned case upon the question involved.

In *Price v. Cox*, 83 N. C. 261, it was held that attachment would not lie in an action of this sort. Smith, C. J., in speaking of this form of action, said: "It is in its essential features an action for the redress of a personal injury like one for defamation, or an assault and battery, and we see no reason for admitting the process of attachment in the one case that does not apply with equal force to the others, nor for putting a construction upon the statute that allows it in any event": See, also, 2 Addison on Contracts, 8th ed., p. 328; 2 Parsons on Contracts, 8th ed., p. 73; 1 Chitty on Pleading, 11th Am. ed., p. 67; 3 Am. & Eng. Ency. of Law, 2d ed., 190; *Roelofson v. Hatch*, 3 Mich. 277.

The exceptional case hereinbefore referred to, in which an attachment was upheld in a case of this sort, is that of *Morton v. Pearman*, 28 Ga. 323. But that case is not pertinent here, because the statute under which the attachment was made authorized suits of attachment "in all cases of money demands, whether arising ex contractu or ex delicto."

Similar latitude was given by the statutes of Minnesota in force in 1860: *Davidson v. Owens*, 5 Minn. 69. But under our statute we are very clearly of the opinion that in order to warrant an attachment the cause of action must be based upon a contract where the damages, although they may be unliquidated, are yet susceptible of estimation and determination by a jury under the ordinary and well-understood commercial and business rules which apply to contracts proper.

In refusing to grant the motion to dissolve the attachment in question, the justice before whom it was made was probably influenced by some remarks of this court in *Drury v. Merrill*, 20 R. I. 2, 36 Atl. 835, in which a breach of promise of marriage²⁹ was involved in one count and a breach of contract growing out of a promissory note was involved in another count. In that case, therefore, it was not necessary to decide whether an attachment would lie in an action for breach of promise of marriage solely; and hence what was said or intimated in that regard was mere dictum. The writer of the opinion in the present case, however, is free to admit that when writing the opinion in that case he was under the impression that an attachment would lie in a case of this sort, on the

ground that it was an action ex contractu. But more careful study has fully convinced him to the contrary.

The defendant's exceptions are sustained, and the case is remitted to the common pleas division with direction to quash said writ of mesne process and dissolve the attachment made thereon.

Actions for Breach of Promise to marry are discussed in the monographic note to *Burnham v. Cornwell*, 63 Am. Dec. 532-548; and defenses to such actions are considered in the monographic note to *Shackleford v. Hamilton*, 40 Am. St. Rep. 172-176.

HUNT v. REILLY.

[24 R. I. 68, 52 Atl. 681.]

MARRIED WOMEN—Estoppel.—If a married woman, knowing of a deed purporting to contain a release of her dower and to be signed by her, within three years after its execution, fails to notify the grantee in her supposed deed or any of his grantees that she did not sign such deed as appears of record, and permits them to suppose that such signature is genuine, she is not estopped, as against them, to set up the fact that her supposed deed is fraudulent. (p. 708.)

ESTOPPEL by Silence.—To sustain an estoppel because of an omission to speak, there must be both the specific opportunity and the apparent duty to speak; the person maintaining silence must have known that some one was relying thereon, and was either acting or about to act as he would not have done had the truth been told. (p. 709.)

J. Champlin, for the plaintiff.

E. D. Bassett, F. Hayes and W. R. Perce, for the defendants.

68 STINESS, C. J. This case has been before us on demurrer to the bill: *Hunt v. Reilly*, 23 R. I. 471, 50 Atl. 833. The respondents now set up by way of plea that they "were all bona fide purchasers for a valuable consideration, and that said complainant knew of the fact that said deed, mentioned in said bill of complaint, purported to be signed by her, within the space of three years after the execution of said deed; but said complainant did not notify the grantee in her supposed deed, nor any of the grantees who hold by mesne conveyances from her said supposed grantee, that she had not signed said deed, as appears of record, but permitted them to suppose that said

signature was genuine; wherefore these respondents insist that said complainant is estopped to set up the claim of fraud, as alleged in her bill of complaint." The case is now heard on the sufficiency of the plea.

⁶⁹ The only difference between the question now presented and the one which was before us on demurrer is in the averments that the complainant knew of the forgery of her name within three years from the execution of the deed; that she did not notify the grantee of the fact of the forgery; and that the respondents are purchasers for value, whom she has permitted to suppose that said signature was genuine, whereby she is estopped. We are unable to see that any of the facts thus alleged have changed the legal aspect of the case. The vital question still remains, By what fact is she estopped? The respondents say by silence, when she should have given some notice; by silence, which has led them to believe that her release of dower was genuine.

The same claim was made in *Viele v. Judson*, 82 N. Y. 32, where, after a mortgage had been assigned, the mortgagee executed a discharge of the mortgage, which was recorded. The assignee knew of the discharge and of the record, but took no steps to reinstate the mortgage. The transfer was recorded, but no note of it was made, as was customary, on the record of the mortgage, and so it was likely to be overlooked on an examination of title, and it so happened. Another mortgage was subsequently given on the same property, both mortgagor and mortgagee knowing that the first mortgage was not paid and that the pretended discharge was invalid, and this was transferred to an innocent purchaser for value.

It was held that the assignee was not estopped from enforcing his mortgage against the innocent purchaser, and this, very plainly, must have been so from the fact that the record showed that the mortgagee had no power to discharge after an assignment. The defendant, however, having set up estoppel against the plaintiff's enforcing his mortgage, the court passed upon the question of estoppel, and thereby overruled *Costello v. Meade*, 55 How. Pr. 356, which held exactly what the respondents claim here. A discharge of a mortgage had been recorded, which the mortgagee said was a forgery. He assigned the mortgage to a bona fide purchaser ⁷⁰ for value, and subsequently a second mortgage was given on the property. It was held that the assignee was estopped because he took no steps to correct the record.

The reason for overruling *Costello v. Meade*, as stated in *Viele v. Judson*, was that to sustain an estoppel, because of an omission to speak, there must be both the specific opportunity and the apparent duty to speak; the party maintaining silence must have known that someone was relying thereon, and was either acting or about to act as he would not have done had the truth been told.

These are the principal grounds of an equitable estoppel, but they do not exist in this case. The complainant had no opportunity to warn the grantee, because she knew nothing about the transaction until after it was completed. She was not present with him or with any subsequent grantee, so far as alleged, so as to have either the opportunity or duty to speak. No one has relied on anything said or done by her, or that was being done with her knowledge, while she stood by in acquiescent silence. So far as appears she did not know of a single sale before it was made, or that any one of these respondents was about to act as he would not have done had he known the truth. It is by no means an unprecedented thing for men to buy land subject to a dower right. Warranties in deeds are given to cover just such known and unknown defects in title. The complainant is not chargeable in law with notice that any one of these respondents would not have made his purchase, had he known that she had not released her dower, and it is not averred that she was so notified in fact.

The respondents' argument comes to this: it is to be presumed that no one would buy land laid out as city lots subject to dower; that this land was liable to be sold to somebody; and that failure to give notice of some sort was equivalent to standing by in fraudulent silence.

We have already said that there is no such presumption in law, and that it is not alleged that the complainant knew of any one of these transactions. The only remaining point is, Does the possibility of sale make it fraudulent not to give ⁷¹ some sort of notice? As we stated in the former opinion, we know of no notice that she was bound to give, or that she could legally and effectively give, and we repeat what we said before—that the respondents do not show what she should have done. They say it is not for them to show this. If they plead an estoppel, they must set up facts which constitute an estoppel. They have pleaded simply that she did not notify the original or subsequent grantees. Notice to the original grantee

before he took the deed was impossible. Failure to notify him afterward could work no estoppel, for in such a case an estoppel does not arise after the fact. Was it fraud not to give some sort of notice, if any effective notice could have been given? We cannot say that it was. She had no present interest in the property. There was no certainty that she would outlive her husband, so as ever to have any interest. She had no knowledge that it was to be sold, as it has been, and to have acted with reference to it would have been action based upon conjecture. The elements of damage to others are too uncertain and remote to enable us to say that silence under such circumstances was fraud in law. As Judge Finch said, in *Viele v. Judson*, 82 N. Y. 32: "Are we not in danger of going so far as to say that if a man patiently and silently bears a wrong, he shall be estopped from saying that it is a wrong? Suppose one's name is forged to a note, and he learns the fact that such paper is afloat. Of course, he understands that somebody may be deceived and injured by it. Must he bring an action against the forger, or prosecute him criminally within a reasonable time, at the peril of being estopped from proving the note a forgery, when collection is sought to be enforced"?

In *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, another illustration is put: "If one man chooses to go upon another's land and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title."

The inducement of another to act, the omission to speak only when there is a duty to speak, with knowledge of the circumstances, are the recognized elements of an estoppel: ⁷² *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Lawrence v. Brown*, 5 N. Y. 394; 11 Am. & Eng. Ency. of Law, 2d ed., pp. 427, 428, and notes.

The cases cited by the respondents are not opposed to this principle. They are cases which, in fact, involve the elements above stated, and so do not rest upon mere silence as this case does. We think that the essential elements of an estoppel are lacking. The plea sets up nothing that the complainant omitted to do which it was her duty to do, and hence it is no answer to the bill.

Plea overruled.

Estoppel Against Married Women is discussed in the monographic note to *Trimble v. State*, 57 Am. St. Rep. 169-185; and the subsequent cases of *Smith v. Ingram*, 132 N. C. 959, 44 S. E. 643, 95 Am. St.

Rep. 680, and cases cited in the cross-reference note thereto; Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34; Cowling v. Hill, 69 Ark. 350, 86 Am. St. Rep. 200, 63 S. W. 800. As to the essential elements of an equitable estoppel, see Wampol v. Kountz, 14 S. Dak. 334, 85 N. W. 595, 86 Am. St. Rep. 765, and cases cited in the cross-reference note thereto.

UPDIKE v. ADAMS.

[24 R. I. 220, 52 Atl. 991.]

PARTITION—Owely.—The general powers of a court of equity are broad enough to require a payment of owely unlimited by a statute providing for a sale of an estate in partition, but applying only to those cases where the division cannot be exact. (p. 712.)

PARTITION—Owely.—To permit a payment of owely, the court must be satisfied that it is equitably necessary, that the amount is fair, and that its payment is not so imposed upon a party as to be unreasonably burdensome. (p. 712.)

PARTITION—Owely—Payment of.—If a person is unable to make payment of owely at the time of division, it should be made a charge or lien upon his share of the property and a reasonable time given for payment. (p. 712.)

Edwards & Angell, for the plaintiff.

Tillinghast & Tillinghast, Comstock & Gardner, J. H. Southwick, Jr., and J. Henshaw, for the defendants.

220 Per CURIAM. A party respondent to this suit of partition objects to a decree enforcing the payment of owely as provided in the report of the commissioners.

The authorities seem to be almost unanimous that the general powers of courts of equity are broad enough to require a payment of this kind: Story's Equity Jurisprudence, secs. 654, 657; Pomeroy's Equity Jurisprudence, sec. 1389; 2 Daniell's Chancery Pleading and Practice, *1156; Bispham's Principles of Equity, 5th ed., sec. 492; Tiedeman on Equity Jurisprudence, sec. 523; Adams' Equity, p. 449; Freeman on Cotenancy and Partition, sec. 507; Beach on Modern Equity Jurisprudence, sec. 993; Clarendon v. Hornby, 1 P. Wms. 446; Horncastle v. Charlesworth, 11 Sim. 315; Calhoun v. Rail, 26 Miss. 414; Martin v. Martin, 95 Va. 26, 27 S. E. 810; Oliver v. Jernigan, 46 Ala. 41; Hall v. Piddock, 21 N. J. Eq. 311; Cooter v. Dearborn, 115 Ill. 509, 4 N. E. 388.

The respondent does not deny the doctrine of these authorities, ²²¹ but claims that our statute (Gen. Laws, c. 265) which provides for a sale of an estate is intended to apply to those cases where the division cannot be exact, and that it thus operates as a limitation upon the general rule in equity by providing a substitute for it.

We do not think this is so. While there is no reported decision in this state of a decree for the payment of owelty against objection, it has so often been required in decrees, without objection, that it seems to have been a generally accepted rule both by the court and bar. It is obviously impossible, in many cases, to divide an estate into parts of exactly equal value. Differences in buildings, location, water, wood, fertility, and other incidents affecting value frequently need to be adjusted by a payment of money. It would be a greater stretch of power to require a large estate to be sold as a whole, where a proportionally small sum is required to meet such an adjustment, than to require the payment of such a sum. We cannot think that the statute was intended to abrogate the power in such cases, and therefore that it is not in substitution for the general power, but, in addition to it, to cover cases in which a payment of owelty is impracticable; for example, the division of a single house and lot between several parties.

The rule, however, which permits owelty to be required must have some limitation. The court must see that the requirement of owelty is equitably necessary; that the amount required is fair; and that its payment is not so imposed upon a party as to be unreasonably burdensome, considering both the condition of the property and the party. Where one is unable to make payment at the time of division, it should be a charge or lien upon his share, and a reasonable time should be given for the payment.

In the present case the estate consists of separate pieces of city property, of different values, showing that an adjustment of values by owelty is necessary. No evidence is offered to show that the proposed division is inequitable, or that the amount required for owelty is unreasonably burdensome.

²²² We are therefore of opinion that the decree, as offered, should be entered.

In Partition Cases the jurisdiction of chancery is unquestionable, where, in order to perfect the partition, it will be necessary to decree pecuniary compensation: *Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655; *Field v. Leiter*, 117 Ill. 341, 7 N. E. 279.

A Lien for Ouelty of partition partakes of the nature of a vendor's lien, and follows the land into the hands of subsequent purchasers: *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861.

SMITH v. PAWTUCKET GAS COMPANY.

[24 R. I. 292, 52 Atl. 1078.]

NEGLIGENCE—Gas Meters.—A declaration stating that a dangerous machine called a slot meter was placed in plaintiff's house by a gas company, but not stating that the meter had any direct relation to the injury sustained, or that it was defective in any way, or, if so, that plaintiff had no means of knowledge of the defect, whereby he is unable to state in what the defect consisted, is insufficient to sustain a claim for damages caused by the meter through the negligence of the gas company. (p. 714.)

NEGLIGENCE—Liability of Gas Companies—Duty to Inspect Pipes.—No general obligation on the part of a gas company can be inferred to inspect gas-pipes in a private house which are not under the control of the company, and as to which it has no apparent relation other than the fact that its gas is to be used through pipes placed therein by the owner, as it has suited him to have them. (p. 714.)

LANDLORD AND TENANT—Application for Gas.—If an owner lets a house supplied with gas-pipes, permission to use the pipes is to be presumed and a consequent authority to apply for gas, and, although the application therefor is made by the tenant, the landlord is as much responsible for the condition of such pipes as though he had applied for the gas himself. (p. 715.)

G. A. Littlefield, for the plaintiff.

Edwards & Angell, for the defendant.

²⁹² **STINESS, C. J.** The plaintiff sues the defendant for negligence in introducing gas into his house, at the request of a tenant. The declaration states that a dangerous machine called a slot meter was placed therein by the defendant, but it does not state that the meter itself had any direct relation to the injury sustained, nor that it was defective in any way, or, ²⁹³ if so, that the plaintiff had no means of knowledge of the defect whereby he was unable to state in what the defect consisted: *Cox v. Providence Gas Co.*, 17 R. I. 199, 21 Atl. 344. If the damage sued for was caused by the meter, the declaration should so state; but it does not.

After stating that the defendant "introduced said gas and said gas meter into said building with great carelessness and negligence," the only specification of negligence is that "the

defendant did not inspect or test the gas-pipes therein, which had been long out of use, to make sure that the said pipes were in suitable condition to receive said gas." The charge thus stated is not that any damage was caused by the meter, but only by the omission of the company to inspect or test the pipes. The declaration alleges this as a duty, but it states no facts or conditions to show how the duty arises, nor whether it is to be inferred from contract, custom or charter.

In the absence of any facts upon which to base an inference of duty, a court cannot infer a general obligation to inspect pipes in a private house, which are not under the control of the company and as to which it has no apparent relation other than the fact that its gas is to be used through pipes placed therein by the owner, as it has suited him to have them. In *Beyer v. Consolidated Gas Co.*, 60 N. Y. Supp. 628, 44 App. Div. (N. Y.) 158, the company had turned off the gas and then turned it on again, without notice, so that gas escaped from a radiator which had been extinguished when the gas was turned off, thus showing an interference by the company sufficient to raise a plain case of negligence by the company. So in *Schmeer v. Gas Light Co.*, 147 N. Y. 529, 42 N. E. 202, a tenement house had been erected; the plans for gas-piping, which had been submitted to the company, included separate outlets for different families, and one of the outlets had been left uncapped, so that gas supplied to one family escaped from an uncapped outlet for another family, causing an explosion. The gas had been turned on by someone not in the employ of the company, and the injury was to those who had not applied for gas. It was held that these circumstances raised a question of fact of negligence by the company. ²⁹⁴ The court, however, said in its opinion: "We are here not dealing with the case of an owner or of a tenant who had made application for a meter and who might be said to have asserted by that act the proper condition of the piping and to have thereby waived any further examination"; and also: "The inspection here spoken of would not include the examination of pipes under floors or covered by plastering; no ripping up of work done in the way of flooring and lath and plastering could reasonably be required. A fair examination of the piping which was disclosed and the ends of tubes coming out into the open spaces through which the gas might penetrate into other quarters than where it was applied for, would certainly be all that could ever be reasonably called for. We do not say that even this must be done as a legal prop-

osition. It is a question for the jury upon the issue of negligence."

We think that this states a just and reasonable rule. Of course it applies only to the supply of gas through private pipes and not to the main pipes, as to which there can be no question of the duty of reasonable inspection.

Most of the cases relied on by the plaintiff are of the latter class, involving leaks from main supply pipes, e. g.: *Tiehr v. Consolidated Gas Co.*, 51 App. Div. 446, 65 N. Y. Supp. 10; *Rockford Coke Co. v. Ernst*, 68 Ill. App. 300; *Schermerhorn v. Metropolitan Co.*, 5 Daly (N. Y.), 144. The other cases cited by the plaintiff on this point were the cases of interference to which we have referred.

In support of the rule stated in *Schmeer v. Gas Light Co.*, 147 N. Y. 529, 42 N. E. 202, are *Tremaine v. Halifax Co.*, 2 Nov. Sc. L. R. 394, *Holden v. Liverpool Co.*, 3 Com. B. 1. *McGahan v. Indianapolis etc. Co.*, 140 Ind. 335, 49 Am. St. Rep. 199, 37 N. E. 601, 29 L. R. A. 355, was decided in favor of the company, upon the ground that an explosion of gas could not take place without the intervention of some agency acting upon it, and that the complaint was defective in not stating facts from which the duty and negligence of the company could be inferred: See, also, note to *Lebanon etc. Power Co. v. Leap*, 29 L. R. A. 342, to which an extended note and summary of cases is appended.

The plaintiff argues that negligence is to be inferred from the fact that the company is dealing with a dangerous substance, and hence bound to use great care in its introduction. ²⁹⁵ Doubtless this is true, so far as it relates to anything done by the company. But one who applies for gas is equally to be presumed to have knowledge of the danger, and the duty is upon him to see that his own pipes, through which the gas is to be used, are in good order. This duty is stronger and more direct upon him than upon the company.

As the declaration sets out only a breach of duty by the defendant in failing to inspect and test the pipes in the house, not the visible ends of pipes, as in *Schmeer v. Gaslight Co.*, 147 N. Y. 529, 42 N. E. 202, and as it refers to pipes which had been long out of use, the inference is that the defect was in pipes which had become unfit for use from rust or disuse. We are therefore of opinion that no case is stated as a proposition of law.

The only allegation of due care is on the part of the plaintiff, and none on the part of the tenant who applied for gas. In *Bartlett v. Boston etc. Co.* 117 Mass. 533, 19 Am. Rep. 421, it was held that an owner of a house could not maintain an action against a company for permitting gas to escape into the house, if the immediate cause of the explosion was the negligence of the tenant in possession. When an owner lets a house supplied with gas-pipes, permission to use the pipes is to be presumed and a consequent authority to apply for gas. The owner is therefore as much responsible for the condition of the pipes as though he had applied for it himself.

The demurrer to the declaration is sustained.

In the Case of Gas Companies, the material and workmanship of the pipes and fittings must be of the highest character, and every precaution within the bounds of reason must be taken to guard against deterioration, misplacement, or leakage: *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819, and cases cited in the cross-reference note thereto; *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603, 54 Atl. 660.

LARSON v. DAWSON.

[24 R. I. 317, 53 Atl. 93.]

TROVER Will not Lie for Money delivered to one person to be expended in behalf of another and by the former converted to his own use. (p. 717.)

T. F. Vance, for the plaintiff.

Miller & Carroll, for the defendant.

317 TILLINGHAST, J. This is an action of trover for the alleged conversion by the defendant of nine hundred dollars in money belonging to the plaintiff. The declaration sets out that on the nineteenth day of July, 1901, the plaintiff was possessed of a large sum of money, to wit, nine hundred dollars, lawful money of the United States, and that on said day he intrusted said money to the defendant with the request that he should purchase for the plaintiff out of said money a certain lot of land situate on Greene street, in Pawtucket, the defendant to pay for said lot the sum of six hundred and fifty dollars, and that with the remaining two hundred and fifty

dollars he was to commence the erection of a house on said lot for the plaintiff; that the defendant received said money in pursuance of said request, and afterward, to wit, on the twenty-third day of October, 1901, he informed the plaintiff that he would not purchase said lot of land with said money, nor would he return the money to the plaintiff; that the plaintiff thereupon demanded of the defendant the said nine hundred dollars, which the defendant refused to deliver, and, not minding or regarding his duty in this behalf, but intending and contriving to injure and defraud the plaintiff, fraudulently and unlawfully converted said money to his own use by expending or dissipating the same, or otherwise disposing thereof contrary to law. And the plaintiff avers that criminal proceedings **318** were instituted against the defendant, for embezzling said money, before the commencement of this action. To this declaration the defendant demurs, on the ground, amongst others, that the action of trover will not lie for money delivered to the defendant under the circumstances above set forth. We think the demurrer must be sustained. The action of trover is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. And in order to sustain it the plaintiff in such an action must show a legal title thereto in himself; that is, he must prove property therein, either general or special, coupled with the right of immediate possession at the time of the conversion: *Thomas Machine Co. v. Voelker*, 23 R. I. 441, 50 Atl. 838. He must also be able to identify the goods and chattels alleged to have been converted, with reasonable certainty at least, or, at any rate, to so describe the property as to render it capable of identification, in order that it may be determined whether in fact it belonged to him as alleged at the time of its conversion.

The question whether money can be the subject matter of an action of trover generally depends upon whether there is any obligation on the part of the defendant to deliver specific money to the plaintiff. A servant who receives a sum of money for his master, which he converts to his own use, is liable in this form of action, because the law imposes upon him the duty of returning the money in specie. Thus, in *Royce v. Oakes*, 20 R. I. 252, 38 Atl. 371, this court held that where the defendant was charged with receiving the money in question simply for safekeeping, the same to be delivered to the plaintiffs on demand, trover would lie against him for converting said money to his own use.

In *Struthers v. Peckham*, 22 R. I. 8, 45 Atl. 742, the money sued for was rolled up in a canvas belt and placed in the defendant's safe, with his permission. It was therefore in his possession for safekeeping, and was also capable of identification: See, also, *Jones v. Hunt*, 74 Tex. 657, 12 S. W. 832.

Of course, the action will also lie where one unlawfully takes money from the possession of the plaintiff. It will also lie **319** where a bank treats a special deposit as general assets: *First Nat. Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186.

In *American and English Encyclopedia of Law*, volume 26, page 767, the law bearing upon the question under consideration is stated as follows: "Trover lies for the conversion of money when there is an obligation on the part of the defendant to return specific coin or notes intrusted to his care. So the action will lie for money received by the defendant and not paid over as requested, or for money paid by mistake to the wrong person. Where the money can be identified, as specie on special deposit, or bank bills by proof of denomination, trover will lie. So bank bills deposited in pledge may be recovered in this form of action; and the rights of the plaintiff are not prejudiced by the fact that the subject matter of the action is money, or the bills of the bank itself, but the same principle is to govern as if the article deposited had been a watch or a jewel."

The facts set out in the declaration before us fail to show a case which falls within the requirements above stated. They are, in short, that in July, 1901, the plaintiff entered into an agreement with the defendant whereby the latter was to purchase for the former a certain lot of land at a certain price and commence the erection of a house thereon; that the sum of nine hundred dollars was advanced by the plaintiff for these purposes, and that several months afterward the defendant refused to purchase said lot of land, and also refused to return said sum of money to the plaintiff on demand being made therefor, but converted the same to his own use. It is to be observed that no description is given of said money, except that it was "lawful money of the United States."

That this money was not delivered to the defendant for safekeeping is evident. It was to be expended, in behalf of the plaintiff, in certain directions. Under the agreement entered into, the defendant doubtless would have been warranted in immediately depositing said money in a bank and drawing thereon as occasion required in carrying out the contract afore-

said. And that such an act would have rendered it impossible to return the same identical bills to the plaintiff, and also impossible for the plaintiff to describe and identify the money ³²⁰ needs no argument. And, this being so, we think it is clear that trover therefor cannot be maintained. In *Donodue v. Henry*, 4 E. D. Smith, 162, it was held that an action in the nature of trover will not lie for money which, with the plaintiff's assent, has gone into the defendant's possession and been mingled with his own funds.

It is evident, from the facts set out in the declaration, that it was never contemplated by either of the parties that this fund of nine hundred dollars was to be kept intact in specie, or that the title thereto was to remain in the plaintiff pending the carrying out of the contract; but, on the other hand, that it should pass to the defendant at once upon delivery, as the title to money ordinarily passes, to be used by him for the purposes aforesaid. Had the agreement in question been an executory one, and the money or some part thereof been capable of identification, the case would have been different. Thus in *Graves v. Dudley*, 20 N. Y. 76, the plaintiff, having agreed to loan two hundred and fifty dollars to third parties, handed bank bills to that amount to the defendant, to be delivered by him to the contemplated borrowers, when any mistakes in the deed to be given as security for the loan, and which was then handed to the plaintiff, should be rectified, if, on examination, any mistake should be found. The plaintiff, after examining the papers, tendered them to the defendant and demanded the bills; and it was held that he could maintain an action for the specific recovery thereof on the ground that, the contract for the loan remaining executory, delivery of the money to the defendant did not change the title to the bills.

The court further held that there is nothing in the nature of bills or money to make a delivery of them work a change of ownership when such was not the intention, or to prevent their being specifically recovered when so identified as that delivery may be made. In that case there was evidence to identify some of the bills delivered to the defendant, and hence the court held that the motion for nonsuit in the court below was properly denied.

As we are of the opinion that the case at bar is practically ruled by the second opinion of this court in *Royce* ³²¹ v. *Oakes*, 20 R. I. 418, 39 Atl. 758, further discussion thereof is unnecessary: See, also, *Riley v. La Rue*, 20 R. I. 425, 39 Atl. 753.

We have examined the cases relied on by plaintiff's counsel in support of the declaration, but do not find that they sustain the position taken. *Crosby v. Clark*, 80 Hun, 426, 30 N. Y. Supp. 329, was an action by a principal against his agent to recover moneys received by the latter in the course of his agency. So far as appears from the report thereof, it was merely an action for money had and received. *Richmond v. Soportos*, 46 N. Y. St. Rep. 19, 18 N. Y. Supp. 433, was an action for the wrongful conversion of a check given for the sum of seven hundred and nineteen dollars and sixty-four cents, and the plaintiff was allowed to recover for that amount. That a check, note, or other writing of value may properly be the subject of an action of trover, probably no lawyer would question. *Tobin v. Kage*, 64 Hun, 531, 19 N. Y. Supp. 440, was a case where it was held that the treasurer of a village, when directed by the trustees thereof to pay a claim against it, has no right to withhold a part of the amount and apply it in payment of an open account of his own against the holder of the claim. It is stated in the opinion that the action was for conversion by the defendant of the unpaid balance of sixteen dollars which was coming to him from the village. But there is no discussion as to the form of action, and nothing to show that it was not in effect a simple action of tort to recover said balance which, for aught that appears, may be allowable under the code of New York. At any rate, it furnishes no sufficient support for the declaration before us.

The demurrer is sustained.

An Action of Trover can be maintained in a proper case, for the conversion of money: See the monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 799, on trover and conversion.

CRAFTS v. CARR.

[24 R. I. 397, 53 Atl. 275.]

NEW TRIAL—Extension of Time to File Evidence.—If a third extension of time within which to file a statement of evidence on motion for a new trial is duly granted by the trial court, it will be presumed to be within the time of a former extension as required by statute, although the latter extension is not on file. (p. 722.)

NEW TRIAL.—Extension of Time for Filing Evidence on motion for a new trial is inclusive of the day to which such extension is granted. (p. 722.)

INFANCY—Liability for Attorney's Fees.—If a suit is brought by an infant through her father as next friend, and she confers with counsel, appears as a witness, and profits by the prosecution of the suit, a promise may be implied by her to pay attorney fees for conducting the suit. (p. 725.)

INFANT'S LIABILITY for Attorney's Fees.—Attorney fees may be recovered against an infant as necessities when the services rendered by counsel affect the infant's personal relief, protection, or liberty, or when they are necessary and financially beneficial to the infant's estate. (p. 726.)

INFANT'S LIABILITY for Attorney Fees.—Attorney's fees in prosecuting for an infant an action to recover damages for an indecent assault upon her are necessities, and may be recovered from her. (p. 729.)

INFANT'S LIABILITY for Attorney Fees.—A father is not bound to provide his infant daughter with counsel fees to prosecute an action for damages for an indecent assault upon her, and if she promises to pay such fees she is bound therefor as for necessities. (pp. 729, 730.)

A. B. Crafts, for the plaintiff.

S. W. K. Allen, for the defendant.

³⁹⁷ ROGERS, J. This is defendant's petition for a new trial, after verdict for the plaintiff, of an action of assumpsit for counsel fees for services alleged to have been rendered to the defendant, who is a minor, in bringing and successfully prosecuting ³⁹⁸ an action at law brought by the defendant by her father and next friend, George H. Sprague, against one Joseph H. Brown, for an alleged indecent assault upon her.

After the petition for a new trial was filed, the plaintiff moved to dismiss it for the following reasons: The defendant, upon the rendition of the verdict against her, duly filed notice of her intention to claim a new trial, and asked for an extension of time to file statement of evidence, etc., which was granted and time was extended to October 15, 1901. On October 31st, the time was further extended to November 8th, on which last-

named date the statement was filed, and has been allowed by the justice presiding at the jury trial. The plaintiff claims that inasmuch as there is no written extension of time from October 15th to October 31st on file, the petition should be dismissed as the last extension was not made "within any extension thereof," etc., as required by the General Laws of Rhode Island, caption 251, section 6, page 864. The statute provides that within five days after verdict, or within any extension thereof from time to time on motion therefor, the justice may extend the time for filing statements to such time as he may prescribe. With such discretion in the justice, it is to be presumed that his action was regular, and that the extension from October 15th to October 31st has been lost. That a clerical error was committed by the defendant's attorney in dates is apparent, for he heads his original motion for time extension thus, "Adjourned June session A. D. 1891," instead of 1901, and asks that the time be extended to October 15, 1891, instead of 1901, the name of the county and the name of parties and the name of court being correctly given. The justice in extending the time gives the date of his action as July 10, 1901, the very date of the rendition of the verdict, and extends the time to October 15, 1901, so the clerical error is of no practical account. The plaintiff also claims that filing the statement on November 8, 1901, is not a compliance with the extension to November 8, 1901. The invariable practice since the enactment of the judiciary act in 1893 by successive judges has been to construe the extension as inclusive of the day to which the extension was granted and to allow statements so ³⁹⁹ filed when correct, and the presiding justice has allowed the statement in this case. The construction so adopted and followed has become too securely established, in our opinion, to be now successfully attacked. For the reasons given the plaintiff's motion to dismiss the petition for a new trial is overruled.

The defendant petitions for a new trial on the ground that the trial justice erred in his rulings upon questions of law raised at the trial, and that said justice declined to rule and charge the jury as requested by the petitioner and ruled against her requests. The defendant's requests which the justice refused to give and to which refusal the defendant excepted, are as follows, viz.: "1. The declaration sets out no cause of action against the defendant, an infant under the age of twenty-one years; 2. The testimony discloses no cause of action against the infant defendant, the services rendered not being necessities

as a matter of law, and the defendant never having ratified the claim after arriving at her majority; 3. If the defendant was an infant under the age of twenty-one years, the father could not bind her estate by any contract with the plaintiff for professional services."

We think the first request was properly denied. In the second judicial district court, where the action was originally brought, the defendant was described as an infant, and her guardian was duly served with process as required by statute. The defendant demurred because the declaration did not set out that the services rendered by the plaintiff as an attorney were necessities. The case was tried both on its merits on the general issue and on the demurrer, evidence being put in as to necessities, and while the district court was holding it for advisement the plaintiff filed an amended declaration with the averment inserted, for the lack of which the defendant had demurred. Subsequently the district judge rendered a long decision in favor of the plaintiff, deciding that the services were necessities. Thereupon the defendant asked for a jury trial and the case was certified to the common pleas division, where the defendant again demurred for the same reason as ⁴⁰⁰ before, with the added ground that the declaration did not set out that the defendant had ratified the contract since attaining majority. The demurrer was overruled and the case was tried to the jury, on the questions whether the defendant had made a promise, and whether the services rendered were necessities that the defendant under the circumstances of the case was liable for, there being no pretense on the plaintiff's part that the defendant had ratified any promise made by her after attaining her majority.

We think the declaration set out a cause of action against the defendant, an infant under twenty-one years, and the trial showed that the defendant's counsel fully understood and appreciated the cause set forth.

The next question raised is whether the plaintiff's services were necessities. The services rendered by the plaintiff were as follows: The defendant in the summer of 1898 was seventeen years old and unmarried. In August of that year her father, George H. Sprague, went to the plaintiff's office in Westerly and told him of an indecent assault upon her by one Joseph H. Brown, and wanted a suit brought in order to protect her and others from similar assaults. The result of the consultation was that the plaintiff brought action against said Brown in the

name of the defendant by her father as her next friend, and after trial thereof, the jury rendered a verdict in favor of the infant (being the defendant in the case at bar) for six hundred dollars, which verdict was sustained on a petition for a new trial, and judgment was entered on the verdict in June, 1899. Mr. Allen, who is counsel for the defendant in the case at bar, was counsel for the said Brown in the damage suit against him. When the plaintiff in the case at bar visited the clerk's office of the common pleas division with reference to getting out an execution in the damage suit against Brown he found a paper filed June 13, 1899, signed by said Brown and by Phebe A. Carr (for Miss Sprague had been married then) to the effect that the case had been settled; but said paper was not signed by her father, George H. Sprague, her next friend, nor had any guardian then been appointed. Notwithstanding this peculiar settlement execution was ordered to issue. The plaintiff in the ⁴⁰¹ case at bar, as shown by the statement of evidence, swore as follows, viz.: "I went to see her [the present defendant] and she was sick. I asked her if she had made that settlement, and she didn't answer at first, but finally admitted that on June 13th she was sent for by Mr. Allen to come to a neighbor's there, and she went without the knowledge of her father or mother and they settled it up taking a four hundred dollar note. At this time she told me she didn't want to settle it and wanted me to look out for her."

The full judgment amounting to six hundred and sixty-three dollars, was finally collected, but not without efforts made in court by said Brown to enforce the settlement. After the execution was collected, the amount was paid to the defendant's guardian, who had then been appointed.

It is urged for the defendant that the plaintiff's claim for services is properly one against George H. Sprague, and not against her.

The situation was this: A girl of seventeen having no estate and no guardian was the victim of an indecent assault. She had a father and mother, and her father, her natural guardian, so to speak, at once took steps for his daughter's protection and for compensation for her sufferings, and incidentally for the punishment of her assailant. Her father was naturally her next friend, and legally became such to enable a suit to be brought, as she, being a minor, could not, except under very extraordinary circumstances, bring it without the aid of a next friend to manage it, which the law presumes, from

the disability of her infancy, she is unable properly to manage herself, the next friend being liable to the defendant for costs of suit in case the infant fails in the action: *Bliven v. Wheeler*, 23 R. I. 379, 50 Atl. 644. If the infant recovers, her estate would be enriched, and as she would then have an estate she would then require a guardian to whom the amount recovered would be paid.

If the suit against Brown was a legally proper one for the next friend to have aided the infant to bring, and the expense of counsel engaged therein was what is technically termed in law "necessaries," then the infant defendant would be liable ⁴⁰² for such necessities. It has been urged that the infant, in propria persona, did not promise the plaintiff in the case at bar to pay him for services, nor did she actually engage him. The father's duty as next friend was to exercise his mature judgment in the management of the action which the immature judgment of the infant, the law presumed, was not equal to; and the very first occasion for the exercise of such judgment was in the employment of capable counsel. The daughter knew of the bringing of the suit and profited by its successful prosecution. She must have conferred with counsel and appeared as a witness, and she certainly attempted to settle such action in a manner highly injurious to her own interests. An implied promise for necessities is sufficient: *Gay v. Ballou*, 4 Wend. 403, 21 Am. Dec. 158; and in the case at bar the circumstances, we think, are sufficient to imply a promise on the part of the infant defendant.

The next question to be considered is, Was the service rendered by the plaintiff as an attorney at law legal necessities for the minor?

In 5 Bacon's Abridgment (edited by Bouvier), 118, it is stated that where infants "contract for necessities they are absolutely bound; and this likewise is in benignity to infants, for if they were not allowed to bind themselves for necessities, no person would trust them, in which case they would be in worse circumstances than persons of full age. Therefore it is clearly agreed by all the books that speak of the matter, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterward."

Bouvier, in his Law Dictionary, volume 2, page 476, says: "The term 'necessaries' is not confined merely to what is requi-

site barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties." Dicey, in his work on Parties, 285, says: "The word 'necessaries,' as applied to an infant, extends beyond the sense which is given it in ordinary conversation. It not only includes such articles as ⁴⁰³ are necessary to the support of life, but extends to articles fit to maintain the particular person in the station and degree of life in which he is placed. The term 'necessaries' is, in other words, purely relative to the infant's position in life. . . . From the relative character of the term, combined with the tendency of juries to find an infant, if it be possible, liable on contracts of which he has received the benefit, has arisen a considerable variety in the decisions on the question as to what things are and what are not necessities." As said by the supreme court of Nebraska in *Englebert v. Troxell*, 40 Neb. 195, 204, 42 Am. St. Rep. 665, 58 N. W. 852: "As to what are necessities for an infant, cannot be defined by any general rule applicable to all cases; it is a mixed question of law and fact to be determined in each case from the particular facts, circumstances, and surroundings in that case."

There are numerous cases to be found in the books deciding that an infant is not liable to an attorney for services rendered, though these are in most part for services rendered as to the infant's property. Then there are cases where infants have been held liable for counsel fees as necessities, even when the services related to the infant's property, if beneficial to the infant's estate: *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; *Thrall v. Wright*, 38 Vt. 494. There is a class of cases allowing counsel fees as necessities for an infant, where the cases in which the services were rendered affected the infant's personal relief, protection, or liberty, which, it seems to us, more closely analogize the case at bar, than those relating merely to property rights.

Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151, was a case where a female infant was seduced and got with child, under a promise of marriage. The seducer afterward refused to marry her, and she was left in a state of destitution and suffering, her father having turned her out of doors. Thereupon she applied to an attorney to bring suit for her for the breach of the promise of marriage. He did so, and it was afterward settled by the marriage of the parties. After the marriage the

attorney sued the husband and wife for his services. The decision was that, if the services were necessary for the personal relief, ⁴⁰⁴ protection and support of the female defendant, the action might be maintained, and the court refused to disturb the jury's verdict for the plaintiff. The court, through Hinman, C. J. (page 307, 31 Conn.; page 152, 83 Am. Dec., says: "The law being founded in reason admits of exceptions. Now, one of the principal reasons why an infant is not allowed to make contracts is to protect him from improvident bargains resulting from his inexperience, and the same reason causes the exception, where he is allowed to contract for necessities, since it can never be for his benefit to be unable to contract for food, shelter, etc., if he has no funds or other means of being provided for; and situated as this infant was, abandoned by her natural protector, and having become an outcast, but still having valid claims which, if enforced, would rescue her from this condition, it appears to us that it was obviously for her benefit that she should be enabled to employ counsel to enforce them. It was not the case of merely prosecuting an infant's right to property, or for the recovery of an ordinary debt. In such cases there is or ought to be a guardian to protect the infant's rights. There was none here, and it does not appear that there were any practicable means of procuring one to be appointed. No one would incur liabilities on her account, unless he could rely upon her agreement to indemnify him out of the damages she might recover in the suit to be commenced. It appears to us, therefore, that while the court recognized the rule that the ordinary fees of an attorney for the prosecution of an infant's rights to property could not generally be said to be necessities, it yet further correctly informed them, in substance, that such services, where requisite for the personal relief, protection and support of the infant, might lawfully be contracted for by the infant, and that he would be bound in law to pay for them. It appears to us that this is a very reasonable rule, which will operate for the benefit of minors, and therefore comes within the principle on which they are allowed in certain cases to make contracts, and in others are not authorized to do so. We think there may be cases, and the jury have found this to be one of them, where a civil suit may, under extraordinary circumstances, be the only means by which an infant can procure the absolute necessities ⁴⁰⁵ which he requires, and where such is the case, it would be a reproach to the law to deny him the power of mak-

ing the necessary contracts for its commencement and prosecution."

In *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, the plaintiff sued an emancipated infant for services rendered him as attorney in defending him in a bastardy proceeding. The court said, *inter alia*: "We think it must be held that an infant is liable for the services of his attorney in defending him against a bastardy proceeding. This may, it is true, sometimes subject him to larger liabilities than he would incur by making no defense and procuring his liberty by applying for a discharge from imprisonment after he had been found chargeable; but it is to be presumed that he is innocent until he is proved to be guilty. A bastardy proceeding, though held to be a civil action, can only be sustained upon the ground that the defendant has committed a criminal offense. His good name is at stake as well as his property, if he has any or ever acquires any—for a judgment rendered against him will be valid, whether he is or is not liable to pay his attorney; and, besides, if he is found chargeable, the court may not release him upon satisfactory evidence of his inability to comply with the order. If an infant has property, the law provides for the appointment of a guardian to hold and manage it. If he has property and is without a guardian, it is very easy to procure one to be appointed. There can rarely be occasion for an infant to employ an attorney in suits relating to his property; but if he has no property, the law does not contemplate that he shall have a guardian; and if one should be appointed in such a case, it would be unreasonable to expect him to employ at his own expense an attorney for his ward. If an infant has no authority to pledge his credit to an attorney when arraigned as the putative father of a bastard child, he may sometimes be prevented from getting bail, or from making a successful defense. We are of the opinion that the consequences of holding that he has such authority are much more likely to be beneficial than prejudicial to his interests. He will only be liable for services and expenses which it was reasonable to render and incur. That his own directions were followed, unless there was reasonable ⁴⁰⁸ cause to believe it was for his interest to follow them, will be immaterial. Any express promise he may make to pay exorbitant fees to his attorney will be void. He will only be liable upon an implied promise to pay a reasonable sum. Charges incurred in making or attempting to make a defense, which there was no good

reason to believe it was for the interest of the infant to make, will not be recoverable."

In *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, the question was as to the liability of an infant to an attorney for services rendered the infant at his request in defending him when indicted for stealing cattle. The court said: "The contracts of an infant for necessities are neither void nor voidable, and we are of opinion that the services of an attorney should be held necessary to an infant when he is charged by an indictment with crime. His life or his liberty and reputation are at stake and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suitable to his condition in life, though they be such as are not demanded by his absolute wants, and it is not to be questioned that the immunity from punishment and disgrace is a matter of far more importance to his welfare. It has accordingly been held that reasonable attorney fees in defense of a criminal action brought against an infant are necessities."

Following the analogy of the last three cases cited, which commend themselves to us, we think that in the case at bar, the action of the defendant against her assailant, Brown, was brought for her protection, even if the result of it, after paying the plaintiff's counsel fees, will increase her estate. We are of the opinion that the counsel fees sued for in this case were legal necessities.

The third request of the defendant which the presiding justice denied, viz.: "If the defendant was an infant under the age of twenty-one years, the father could not bind her estate by any contract with the plaintiff for professional services"—might be correct as an abstract proposition of law disconnected from the circumstances of this case, but, with its connection, we think it was properly denied. The father's employment of ⁴⁰⁷ the plaintiff as counsel in the action against Brown was simply for his infant daughter while he was acting as her *prochein ami*, and in connection with the conduct of his daughter was not the father's promise, but the implied promise of the infant daughter.

We find no errors in the rulings of the presiding justice at the jury trial of which the defendant can complain, for the defendant's fourth request to charge was granted, and that, in our opinion, without further explanation, was too favorable to the defendant. That request was as follows: "Nothing to the

contrary appearing, it is presumed that the father provided the defendant with all necessities and she cannot bind herself for necessities." It is a general rule that a father (at least of sufficient ability: *Pearce v. Olney*, 5 R. I. 269) is bound to supply an unemancipated infant with food, raiment etc.—the ordinary necessities—yet he is not bound, in our opinion, to supply counsel fees out of his own purse for the infant in a case like that against Brown, and the evidence showed that the plaintiff trusted the infant and not the father. The principle upon which the father of an infant is obliged to provide the ordinary necessities is that he is entitled to the infant's wages until he voluntarily emancipates her during her infancy, or the law emancipates her upon attaining her majority. The action against Brown was brought by the infant for the suffering he inflicted upon her and for her protection against him in the future. It was not brought by the father for the loss of the infant's services, and it could not have been brought by him for her suffering, hence the amount recovered went not to him but to the infant, and has been paid to the infant's guardian. It seems to us clear from analogy that just as an emancipated infant can bind herself for necessities of all kinds when released from her father's claim upon her for the consideration she is liable to him for the necessities furnished by him, so she can bind herself for necessities such as the one under consideration, for which, the father not being bound to provide for her, he technically gets no benefit from. It certainly does not seem just that a father, of slender means perhaps, should be obliged to pay counsel for services which technically he gets ⁴⁰⁸ no pecuniary benefit from and the infant's estate gets all the pecuniary benefit of.

In *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, the infant's father turned her out of doors, while in this case the infant's father lent all the aid in his power, but in the former case the court required the counsel's services to be paid, and we see no reason why in this case counsel is not equally entitled to pay for his services. Whether, however, the fourth charge was too favorable for the defendant or not is of no consequence, as it did not injure the defendant.

The defendant's conditional exception contained in her counsel's words—"If your honor has charged that the jury is to decide whether these services were necessary or not, then I wish to take an exception"—if formally correct and allowed, can avail the defendant nothing. There are authorities both

ways, viz., that the question of necessities is for the court, and also that it is a question for the jury. Inasmuch as the jury have found that the plaintiff's services were necessities, if it was a question for them, and inasmuch as, if it was a question for the court, the court would have had to have ruled that said services were necessities in this case, the defendant has no ground to be aggrieved.

For the reasons hereinbefore given, the defendant's petition for a new trial is denied, and the case is remitted to the common pleas division with direction to enter judgment upon the verdict.

INFANT'S LIABILITY FOR ATTORNEY'S FEES.

- I. As Necessaries.
- II. In Civil Cases.
- III. In Criminal Cases.

I. As Necessaries.

The authorities are agreed that the only ground upon which an attorney can recover for his services rendered an infant upon a contract, express or implied, is that they are for "necessaries," and are rendered in effecting the infant's personal relief, protection, or liberty, or that they have been highly beneficial to the infant's estate: *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 58 N. W. 852; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; *Thrall v. Wright*, 38 Vt. 494.

In *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434, the court said: "The liability of an infant for necessities is based on the necessity of his situation. As he must live, the law allows to anyone supplying his wants a reasonable compensation. The law implies the promise to pay from the necessity of his situation. What are 'necessaries' cannot be determined by any arbitrary and inflexible rule. It depends on circumstances, and each case must be governed by its own. It is stated in the books that the wants supplied must be personal to the infant, either for the body or the mind, in order to come within the description of necessities, and that counsel fees and expenditures in a lawsuit are generally excluded. This is, no doubt, the general rule and for an obvious reason. Usually an infant who has an estate has a guardian, who may and should engage and pay counsel, where the interests of the infant committed to his guardianship require it. When an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant and devoted his services to the protection of the interests of the infant in such litigation, and as the result of the litigation an estate has been secured to the infant, it is just and proper, and within the principle on which

an infant is held liable for necessities, that the reasonable fees of such counsel should be paid out of the estate thus obtained. If the infant had had a guardian who had employed and paid counsel, he would have been entitled to reimbursement out of the estate of the ward for the reasonable fees so paid, to be allowed on settlement by the chancery court. Shall the fact that the infant had no guardian, until the acquisition of the estate involved in the litigation in which the services of counsel were rendered made one necessary, deprive counsel of just compensation? We say no! It will operate for the benefit of infants to allow just compensation for counsel fees and expenditures in their behalf in maintaining their rights in litigation which results in securing to them the means of supplying their wants": *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 435. Again, in *Searcy v. Hunter*, 81 Tex. 647, 26 Am. St. Rep. 837, 17 S. W. 372, it was said: "For necessities furnished an infant the law implies a contract. These are usually food, lodging, wearing apparel, medicine, medical attendance, and the means of an education. Such is the more rigid rule of the common law. But there are cases which recognize that fees of attorneys for services rendered infants may under some circumstances be treated as necessities, for the payment of which the law will imply a contract. Looking to the condition of affairs in our own state, it seems to us that to refuse to allow an attorney, who, at the instance of a next friend, has instituted a suit in behalf of a minor and recovered for him money or property, to claim from the infant a reasonable compensation for his services would be to establish a rule which operates to the prejudice of the class it is designed to protect. In such case where the services have been beneficial to the infant we are of opinion that reasonable compensation should be allowed."

As before shown, the question whether attorney fees in any particular case are necessities for the infant from which a contract may be made or implied is a question of fact purely, which must be answered from the facts in each individual case, as the meaning of the term 'necessaries' cannot be defined by any rule applicable to all cases, and it has been held that such question is a mixed one of law and fact to be determined in each case from the particular facts and circumstances of such case: *Englebert v. Toxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 58 N. W. 852; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176. A lawsuit may be necessary for an infant, and whether it is or not must be determined by the circumstances, as in case of other things claimed to be necessities: *Thrall v. Wright*, 38 Vt. 494.

It seems that the party setting up that attorney's services rendered an infant are necessities has the burden to prove that fact, as, in the only case where the question is discussed, it is said that the plaintiff insists that the burden of proof is on the infant to show that the articles furnished were not necessary, and that the court erred in requiring the plaintiff to show, in order to rebut the plea of in-

fancy, that the articles were necessary. The plaintiff's account being for counsel fees and disbursements in a lawsuit, the articles charged were not in the class of necessities—*prima facie* were not necessities. The burden of proof was clearly on the plaintiff, to show that they were necessities : *Thrall v. Wright*, 38 Vt. 495.

II. In Civil Cases.

A number of cases hold, and we think establish the rule, that infants are liable for counsel fees as necessities in civil suits, even where the services relate to the infant's property, if beneficial to the estate of the latter, or if engaged and rendered for the necessary personal relief of the infant. In other words, a minor may make a necessary contract for the commencement and prosecution of a civil suit, if, under the peculiar circumstances of the case, it is the only means by which he can procure the relief to which he is entitled: *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Nagle v. Schilling*, 14 Mo. App. 576; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821. Thus if an infant has no guardian, his estate is liable for fees of counsel whose services were beneficial in recovering the estate: *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434. Or if, in such case, the suit is brought at the instance of a next friend: *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372. And attorneys who contract with a minor and perform beneficial services under such contract are entitled to reasonable compensation from him: *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821. The proper defense of a suit against an infant is a necessary for the cost of which his estate may be held liable under an implied contract or request to render services as attorney in making such defense: *Nagle v. Schilling*, 14 Mo. App. 576. In *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, it appeared that a female infant was seduced and got with child under a promise of marriage, and that her seducer afterward refused to marry her and that she was left destitute, her father having turned her from his home. She then applied to an attorney to bring suit for her for the breach of promise of marriage, and after he had done so, the case was settled by the marriage of the parties. After such marriage the attorney sued the husband and wife for his services, and it was decided that the legal services being necessary for the personal relief, protection, and support of the female infant defendant, it necessarily followed that the action might be maintained, and that the attorney was entitled to recover the reasonable value of his services. This case of *Munson v. Washband* is so fully quoted from in the principal case that we refrain from any further mention of it here. In a similar case in New York concerning the settlement of an action for a breach of promise to marry brought by an infant, it was held that although a liability might exist on the part of the infant to pay for services performed by an attorney if necessary for

the infant's protection, or that of his estate in such a case, yet such liability is limited to the actual value of the services rendered, and the infant is not bound by any agreement which he or she may have made as to the amount, especially when such amount seems to the court unreasonable and excessive: *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. Supp. 237.

There is a line of cases, however, which, in principle, at least, are opposed to those heretofore considered. Thus in *Dillon v. Bowles*, 77 Mo. 603, it appeared that all of the adult heirs at law interested in a tract of land affected by a will united in employing an attorney to prosecute a suit to set aside the will, agreeing in case of success to convey to such attorney one-half of the land as compensation for his services. Through the exertion of the attorney the will was set aside, and it was held that a minor heir, though benefited by the result equally with the adult heirs, was not bound either at law or in equity to contribute to the payment of the fee. The decision was put on the ground that there was no agreement, express or implied, on the part of the infant heir to pay for any part of such legal services, and that for this reason he was not bound therefor. In *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665, 58 N. W. 852, it appeared that an attorney, after having himself appointed as guardian ad litem of an infant, defended, in behalf of such infant, a suit brought to foreclose a real estate mortgage executed by the infant's ancestor, and although the litigation terminated in a benefit to the infant's estate, it was held that such legal services were not necessities for which the infant or his estate was liable. In another case, that of *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176, it appeared that at the request of an infant an attorney examined the public records, and advised the infant as to his rights to certain property inherited from his deceased father, and it was held that the services thus performed by the attorney were not necessities for which the infant was liable. In *Phelps v. Worcester*, 11 N. H. 51, it was shown that a suit was brought by direction of a guardian of an infant to protect the title of the latter to an estate, and that such suit was of direct benefit to the infant's estate, and it was held that legal services and expenditures in such case were not necessities for which the infant would be liable even under an express promise. Notwithstanding the language used in the case last cited, we think the decision was right, because an infant acting under or by direction of his guardian in procuring legal aid cannot bind himself personally even for necessities. In such case the attorney must look to the guardian alone for compensation for his services rendered in behalf of the infant.

III. In Criminal Cases.

It is a general rule that the services of an attorney should be held necessary to an infant when he is charged with crime. Thus, "the

contracts of an infant for necessities are neither void nor voidable, and we are of opinion that the services of an attorney should be held necessary to an infant when he is charged by an indictment with crime. His life, or his liberty and reputation, are at stake, and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suitable to his condition in life, though they be such as are not demanded by his absolute wants, and it is not to be questioned that the immunity from punishment and disgrace is a matter of far more importance to his welfare": *Askey v. Williams*, 74 Tex. 294-297, 11 S. W. 1101.

Services of an attorney rendered to an infant in defending him in a bastardy proceeding are necessities, for which, when it is reasonable for him to make a defense, he is liable on an implied promise: *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160. "Upon a diligent examination of the reported cases, we have found no direct authority on the question whether an infant is liable for services rendered by an attorney in defense of a bastardy proceeding or a criminal proceeding. But it seems that professional services which it is reasonable for him to have rendered in defending him in a prosecution for a criminal offense in which his liberty and even his life may be at stake, are necessities for which he ought to be liable": *Barker v. Hibbard*, 54 N. H. 539, 540, 20 Am. Rep. 160.

In *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176, it appeared that an infant was by judgment of a court committed to a reform school, and before his term expired he was released on parole during good behavior. He violated his parole and was taken in custody by the sheriff for the purpose of being returned to the reform school. He then employed an attorney, who sued out a writ of habeas corpus, and tested the sheriff's right and authority to return the infant to the reformatory, and it was held in a suit by such attorney against the infant to recover the value of his legal services that the question as to whether such services were necessities was for the jury to determine, and that the verdict in relation thereto would not be disturbed on appeal: *Cobbey v. Buchanan*, 48 Neb. 391-397, 67 N. W. 176.

PAOLINO v. McKENDALL.

[24 R. I. 432, 53 Atl. 268.]

NEGLIGENCE—Infant Licensees—A mere naked license or permission to minors to enter or pass over land does not create a duty or obligation on the part of the owner or occupant to provide against danger from accident. He owes to such licensee no duty as to the condition of the premises, save that he shall not knowingly let him run upon a hidden peril or willfully cause him harm. (p. 739.)

NEGLIGENCE—Infant Trespassers or Licensees—Although an owner or occupant of land has knowledge that children of tender years are in the habit of going thereon to play he is under no duty or obligation to guard them from injury caused by fire set by him to consume waste materials. (p. 746.)

D. J. Holland, for the plaintiff.

Miller & Carroll, for the defendant.

432 ROGERS, J. This is a demurrer to both counts of the plaintiff's declaration in an action of trespass on the case for negligence. The first count is as follows: "For that the said defendant on, to wit, the eighth day of July, A. D. 1901, by his agents and servants was engaged in erecting a building on Swiss street near Knight street, public highways in the city of Providence; that near to and adjoining the lot upon which said building was erected was a vacant lot, which for a long time theretofore had been used by the occupiers of the premises in the vicinity and neighborhood thereof as a common resort for pleasure of said occupiers and as a playground for **433** their children and in which the plaintiff's intestate, a child of one of said occupiers, and other children, the children of said occupiers, with the knowledge and consent and by the invitation of the owner of said premises, were accustomed to play, to the knowledge of said defendant; and that on to wit the eighth day of July, A. D. 1901, the said defendant, by his agents and servants lighted a large fire upon said lot for the purpose of burning waste materials used in the building of said house. And the plaintiff avers that it was the duty of the defendant to take and use reasonable and proper means and precautions to prevent accident or injury happening to the plaintiff's intestate while using said parcel of land as a playground aforesaid, and to keep and maintain said fire so started by him as aforesaid properly guarded and protected against damage to the lives of children of tender years who might go, wander or be allured or attracted thereto by their childish instincts, yet the defend-

ant, well knowing the premises, but not regarding his duty therein as aforesaid, neglected, failed and refused to take and use reasonable and proper means to prevent accident or injury to the plaintiff's intestate while using said parcel of land as a playground as aforesaid, and did not keep and maintain said fire so started as aforesaid properly protected and guarded. And the plaintiff avers that on, to wit, the eighth day of July, A. D. 1901, at Providence, the plaintiff's intestate, who was then and there a child of tender years, to wit, of the age of five years, being a child of one of the occupiers of the premises in the vicinity and neighborhood of said parcel of land, while using said parcel of land as a playground aforesaid with the knowledge and consent and by the invitation of the defendant, and while in the exercise of due care and allured and induced by her childish instincts to approach said fire, her dress suddenly caught fire from said flame, and she was so seriously burned that in consequence thereof she died."

The second count is substantially like the first, except that it is alleged that the defendant was building the house as a contractor, and it is not alleged that the plaintiff's intestate went upon the lot by reason of any invitation of the defendant or the owner of said lot.

⁴³⁴ The grounds of demurrer to the first count are: 1. Because it does not state facts sufficient to constitute a cause of action; 2. Because it does not set forth with sufficient certainty wherein said defendant's negligence consists; and 3. Because it appears therein that the injury to the plaintiff's intestate was caused by her own negligent act in approaching said fire.

The grounds of demurrer to the second count are the same as those to the first count with two additional grounds, but the third ground to the first count constitutes the fifth ground to the second count. The third and fourth grounds of demurrer to the second count are: 3. Because there is no averment therein that plaintiff's intestate was upon said lot upon the invitation, or with the knowledge or consent, of said defendant, or upon the invitation or with the knowledge or consent of the owner of said lot, if said defendant was not the owner thereof, nor is there set forth in said count any facts showing such invitation, knowledge or consent; 4. Because, according to the allegations in said second count, the defendant owed no duty to the plaintiff's intestate to keep her from being injured as set forth in said count while on said premises.

In the words of the plaintiff's brief: "The plaintiff bases his case solely upon the theory that an occupier of land, having thereon dangerous agencies, to which children of tender years, too untrained and inexperienced to appreciate the dangers and resist the temptations placed before them, are likely to be allured or attracted, is under the duty of exercising the care which an ordinary person would exercise in the premises to prevent injury therefrom to such children, either by guarding or inclosing the dangerous agency, or by giving warning to parents of the existence of the danger."

The words "by the invitation of," referring to the owner or occupier of the premises, in connection with the use of said lot as a common resort as a playground for the children of the neighborhood including the plaintiff's intestate, are more than once used in the first count of the declaration, yet an express invitation is nowhere alleged, and those words are ⁴³⁵ always preceded by the words "with the knowledge and consent and." With such a use of words, coupled with the theory upon which the plaintiff bases his claim as shown in the above quotation from his brief, we understand that the only invitation to use said lot as a playground for children intended to be alleged was only a constructive invitation, or such, if any, as could be implied from the owner's or defendant's knowing said lot was so used without objection made, and that as to the fire there was no invitation to approach it other than the fact of the fire being there, whereby the plaintiff's intestate was "allured and induced by her childish instincts to approach said fire." We are further led to this understanding by the fact that some of the cases cited on the plaintiff's brief proceed upon the doctrine of constructive invitation; that is, that if, by way of illustration, a person is allured or, more properly tempted, by some act of a railroad company to enter upon its land, he is not a trespasser, and it has been held that leaving a turntable unguarded is such an act. We have been thus particular in defining our understanding of the use of the word "invitation" in the first count of the declaration, because if the invitation to the plaintiff's intestate to use said vacant lot as a playground was express, or by implication, making it equal in significance to an express invitation, the rule as to liability would be very different from what it would be if the invitation was only constructive, consisting of the kind of allurements or mere license we have referred to.

The basis of a cause of action for injury to a person by reason of negligence or want of due care is the breach of some duty or the nonobservance of some obligation that the defendant is under to the plaintiff. As said by the New Jersey court of errors and appeals in Delaware etc. R. R. v. Reich, 61 N. J. L. 635, 637, 68 Am. St. Rep. 727, 40 Atl. 682: "There cannot be such a thing as the negligent performance of a nonexistent duty." The very first step in attempting to fasten a liability upon a defendant is to show a duty he is under, either by commission or omission, to the plaintiff. Having done that, the next step is to show the breach or neglect of such duty. "There is a ⁴³⁶ clear distinction," said this court in Beehler v. Daniels, 18 R. I. 563, 565, 49 Am. St. Rep. 790, 29 Atl. 6, "between a license and an invitation to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation."

In speaking of this class of cases Bigelow, C. J., in Sweeny v. Old Colony etc. R. R. Co., 10 Allen, 368, 373, 87 Am. Dec. 644, after referring to keepers of inns and of shops, said: "The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land

by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." ⁴³⁷ As to what such an inducement or allurement is will be considered later. "The rule is," said the supreme court of New Jersey in *Vanderbeck v. Hendry*, 34 N. J. L. 467, 472, "that he who enjoys the permission or passive license is only relieved from the responsibility of being a trespasser, and must assume all the ordinary risk attached to the nature of the place or the business carried on."

In the case at bar the defendant is sought to be made liable upon the doctrine of a series of cases called the "turntable cases," consisting of *Railroad Co. v. Stout*, 17 Wall. 657, decided in 1873, and reviewed and adhered to in *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619, decided in 1894, and of other cases following it. In the *Stout* case a boy six years old was injured while playing on a railroad company's land on a railroad turntable that was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. The propositions laid down in that case by Hunt, J., delivering the opinion, are that "while it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." Further, that "while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

The doctrine of that series of cases is thus clearly and comprehensively stated in 7 *American and English Encyclopedia of Law*, second edition, 403, 404: "When a child of tender years commits a mere technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger but not so to a child, he is not debarred from recovering, if the things instrumental in his injury were left exposed and un-

guarded, and ⁴³⁸ were of such a character as to be likely to attract children, excite their curiosity, and lead to their injury, while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication."

The facts alleged in both counts of the declaration in the case at bar are so analogous to those in the "turntable cases" as to make the principle of law properly applicable to one also applicable to the other, and inasmuch as the rule of the so-called "turntable cases" has been adopted by many courts, thus affording ample authority, yet whether we shall follow that rule depends upon the weight of the reason on which it rests, for some of the courts which have recognized the rule have limited its operation strictly to turntables and other dangerous and attractive machinery, and it has been utterly rejected by the courts of last resort of New Hampshire in 1886, Massachusetts in 1891, New York in 1895, Texas in 1897, New Jersey in 1898, West Virginia in 1898 and again in 1901, Michigan in 1901, and Georgia in 1901: See *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283; *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068; *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62; *Delaware etc. R. R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682; *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644; *Savannah etc. Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82.

The disapproval of *Railroad Co. v. Stout*, 17 Wall. 657, in the cases just cited is very emphatic, and the president of the supreme court of appeals of West Virginia, in *Ritz v. City of Wheeling*, concludes his stricture upon it in this wise (page 270, 45 W. Va., page 996, 31 S. E.): "I am guilty of no undue assumption in condemning the Stout case, as it has received in some courts, the most eminent in the land, open condemnation, and in others criticism tantamount to condemnation; and some which followed it limit its application to its facts or desire to recant."

It is apparent, as stated in the New Jersey case of *Delaware etc. R. R. Co. v. Reich*, 61 N. J. L. 636, 68 Am. St. Rep. 727, 40 Atl. 682, and in the West Virginia case ⁴³⁹ of *Uthermohlen*

v. Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, that the principle on which the doctrine of liability rests in the "turntable cases," if sound, must be applicable more widely than to railroad companies and their turntables; and that it would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery or implement maintained by them, which presented a like attractiveness and furnishes a like temptation to children.

The Stout case was decided in October, 1873, and since then has been referred to at least twice in the court of last resort in this state. Bishop v. Union R. R. Co., 14 R. I. 314, 51 Am. Rep. 386, decided in January, 1884, was a case of negligence, where two empty horse-cars of the defendant, fastened together one behind the other, and drawn by a single horse, were driven slowly over the company's tracks in a public highway in the city of Providence by a driver occupying the platform in front of the forward car, from the stable in Elmwood to the repair shop on Thurber's avenue. The plaintiff, a boy six years old, to outstrip a playmate with whom he was racing, jumped on the rear platform of the leading car and soon afterward fell off or jumped off, and was seriously injured. After nonsuit, the plaintiff petitioned for a new trial, which was denied, and Durfee, C. J., delivering the opinion, in referring to a dangerous object left exposed without guard or attendant, in a place of common resort for children said: "An object so left is a standing temptation to the natural curiosity of a child to examine it or to his instinctive propensity to meddle and play with it. In Keffe v. Milwaukee etc. Ry. Co., 21 Minn. 207, 18 Am. Rep. 393, which was precisely like Stout v. Sioux City etc. R. R. Co. [the name of the Stout case in the court below], this peculiarity was specifically stated and commented on as the ground of liability. 'The defendant knew,' say the court, 'that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable but was holding out an allurement which, acting upon the natural instincts by which children are controlled, drew them by those instincts into hidden danger.' These cases seem to reach the limit of liability. They go beyond ⁴⁴⁰ what was thought to be the limit in Mangan v. Atterton, L. R. 1 Ex. 239." The court then proceeds to distinguish the case from the turntable cases.

In Goodwin v. Nickerson & Dugan, an unreported case, being decision No. 3834 in this court, October term, 1891, the

declaration set out that the defendants, being in the business of moving buildings, in the course thereof used their own lot situated on South Bend street in Pawtucket, a public highway (and surrounded by many houses and entirely open and unfenced and commonly used by children of tender age as a playground), for storing and placing thereon large quantities of timber and blocking, and were in the habit of piling such blocking and timber in such manner that certain long timbers, by being placed upon a pier of said blocking were easily tilted or balanced, and formed what is commonly known as a "see-saw," thus rendering said timber upon said piles of blocking not only dangerous from its liability to fall, but also attractive to children, etc., whereby the duty devolved upon defendants to take such care in the piling of such timbers and blocking so to place them that they should not attract children thereto and that the same should not be in danger of falling upon and crushing said children, and so to fence and otherwise to protect said lot and said pile of timber and blocking that children should be prevented from coming thereupon, or in such proximity thereto as to cause peril to life; and alleging defendants' neglect of said duty whereby a large beam fell upon plaintiff's son, less than four years old, who had been attracted to said lot by said timbers and so grievously injured him as to cause death. The defendants demurred, and the court overruled the demurrer in a short rescript in this wise: "The court is of the opinion that the plaintiff's case as set forth in the declaration falls within the class of cases represented by *Railroad Co. v. Stout*, 17 Wall. 657."

The recognition of the authority of the Stout case accorded in the Bishop case is altogether too dubious, and that in the Goodwin case is too little considered, to establish a rule of law by which we are willing to abide in the case at bar and ⁴⁴¹ in future cases. In the Bishop case the court not only does not follow the Stout case, but attempts to distinguish it, and characterizes it as "seeming to reach the limit of liability," if not, indeed, intimating that it has exceeded it by the reference to *Mangan v. Atterton*, L. R. 1 Ex. 239. In the Goodwin case the Stout case seems to have been accepted as authority as a matter of course, apparently without mature consideration, notwithstanding the very equivocal treatment of it in the Bishop case, and the fact that our neighboring state of New Hampshire in *Frost v. Eastern R. R.*, supra, decided in 1886, four years before the Goodwin case, declined to follow the Stout case in the

following unambiguous terms: "We are not prepared to adopt the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers."

The reasoning of the *Stout* case is so unsatisfactory that we cannot give it our approval, and it is evident from the trend of decisions during the last seven years that disapproval of the doctrine of that case has been greatly on the increase. The supreme court of Michigan, speaking as late as October 22, 1901, in *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644, said: "The rule laid down in *Railroad Co. v. Stout* must be a general one, applicable to everyone; and, aside from the impropriety of judicial legislation, a wise public policy should forbid such a sweeping innovation by judicial main strength. In innumerable cases the courts have applied and continue to apply the general rule that a land owner need not protect a trespasser, every case being an assertion of the principle which is disregarded in the cases relied on by the plaintiff. We have cited a few of them—enough, we think, to show that the great weight of authority does not sustain the principle of the turntable cases. While some of the courts have followed the rule of *Railroad Co. v. Stout*, 17 Wall. 657, both the courts and profession have evinced a tendency to allow this innovation to go no further, and refuse to consider it applicable to other cases every way ⁴⁴² analogous. They speak of the cases generically, as the 'turntable cases,' and treat such cases as exceptional. We are of the opinion that they are exceptional, and that they are not based upon principle, but contravene one of the old and established rules of the law; and we therefore decline to recognize them as authority, preferring to adhere to the better doctrine of the other cases cited. The defendant owed no duty to these children, who were trespassers."

We find no satisfactory ground for the distinction, sought to be made, between infants and adults in the duty of the owner or occupier of land to a mere trespasser to keep his premises safe. Clark, J., in *Frost v. Eastern R. R.*, 64 N. H. 220, 11 Am. St. Rep. 396, 9 Atl. 790, states the law very clearly in this wise: "A land owner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all

risk of danger from the condition of the premises; and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. . . . The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with or enter upon it. . . . To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it. . . . One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing the gates and bars to guard against accidents to straying and trespassing children. The owner is ⁴⁴³ under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must as a rule have reference to all classes alike": *Nolan v. New York etc. R. R. Co.*, 53 Conn. 461, 4 Atl. 106."

Again, the Stout case, it seems to us, errs in construing a mere temptation as an allurement sufficient to legally constitute an invitation to enter the premises of another. "Temptation," says Holmes, J., in delivering the opinion in *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364, 46 N. E. 115, "is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property

rights because the temptation to untrained minds to infringe them might have been foreseen."

It is not easy to give an exhaustive definition, within reasonable limits, of exactly what is meant by the words "allurement, or inducement" that legally operate to constitute an invitation to enter the premises of another, but as we have seen that mere temptation does not form such an inducement, a single illustration of what would form such an inducement will be sufficient for our purpose. *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644, from which we have already quoted as to the difference in the duty of an owner or occupier of land to one who enters upon his land by invitation express or implied, and to one who enters without such invitation, even if he has a mere naked license or permission to enter or pass over the land, affords us that illustration. In that case a railroad company that had made a private crossing over its track, at grade, in a city, and allowed the ⁴⁴⁴ public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there was danger, was held liable to damages to one who, using due care, was induced to cross by a signal from the flagman that it was safe, and was injured by a collision which occurred through the flagman's carelessness.

We see no good purpose to be served by our further considering the general principles upon which the case at bar rests. Suffice it to say that we approve the cases hereinbefore cited as disapproving the doctrine in the *Stout* case, as well as a masterly monograph entitled "Liability of Land Owners to Children Entering Without Permission," in 11 *Harvard Law Review*, 349-373, 434-448, by the Hon. Jeremiah Smith, formerly one of the justices of the supreme court of New Hampshire—all of which have learnedly, and some of which have exhaustively, considered those principles and afford ample support for the views we entertain.

The plaintiff urges upon our attention the unreported case in this court of *Lemieux v. Darling*, Ex. No. 2688, 1900, wherein the plaintiff recovered, as one exactly analogous to the case at bar. In that case the plaintiff's intestate, a child five years old, while attracted to the unfenced lot of the defendants abutting on two public highways in Woonsocket by an apple tree thereon, the branches whereof hung over an insecurely guarded well situated two hundred and forty-one feet from one highway and ninety-five feet from the other, fell into said well and was

drowned. The court in a brief rescript said: "The principal question argued, namely, the liability of a land owner for injuries received by trespassing children from some dangerous object, agency or condition negligently permitted by such land owner to exist on the land trespassed upon, is not before us. No ruling of the court denying such liability was asked for by the defendants." After a brief recital of the instructions given by the trial justice to the jury, followed by the words, "and no exception was taken by the defendants to such instructions," the rescript concludes as follows: "There is no evidence that the plaintiff knew that the well was not securely covered so that it would be ⁴⁴⁵ safe, and therefore the jury were warranted in finding that he was not negligent." That case seems to us to furnish no authority for the case at bar, for in the Lemieux case the defendants, by not raising any question of the defendants' liability to the trespassing child, practically admitted that they had been guilty of a neglected duty and defended against their liability thereon, on the ground that the child had been guilty of contributory negligence, whereas the question in the case at bar is, simply, whether, on the facts alleged in the declaration—construing the word "invited" contained therein as referring only to a constructive invitation as explained in the quotation from the plaintiff's brief hereinbefore set forth—the defendant was liable on any neglect of duty he owed to the plaintiff's intestate.

With such a construction of the word "invited," used in the first count, as intended by the plaintiff's counsel already explained, leaving both counts without an allegation of invitation to the infant, express or implied, other than a constructive one amounting at most to a mere license to enter upon the land, we are of the opinion that neither count of the declaration states facts sufficient to constitute a cause of action, because there is no breach alleged of any legal duty the defendant owed the infant; and, of course, if there was no duty owed there could be no neglect of duty, and the infant's injury was caused by his own negligent act solely in approaching the fire. We have already decided that the constructive invitation set out, or intended to be set out and hence treated by us as such, is not a sufficient invitation to cast a legal duty upon the defendant in regard to said infant, other than not willfully subjecting him to injury, and as no such willful injury has been alleged we fail to see how the suit can be sustained without al-

legation and proof of an invitation to the infant, express or implied, to enter upon said premises.

The plaintiff raises the point whether the question of what is an attraction for children is not one for the jury. In our view of the law the question in this case is not whether a fire is or is not attractive to a child, but whether on the undisputed ⁴⁴⁶ facts alleged in this case, for the demurrer admits them to be true, there was any duty on the owner or occupier of the land on which this fire was located to guard the child against it. Whether the facts alleged, not being questioned, raised a duty on the defendant in favor of the child, it seems to us is a question of law for the court that can properly be decided on demurrer. In *Ritz v. City of Wheeling*, Brannon, president of the West Virginia court of appeals, on page 263 of 45 W. Va. and page 994, 31 S. E., says: "The case is not one involving credibility of witnesses, or weight of evidence, or the proper inferences and deductions from evidence, which are matters proper for the consideration of a jury; for the material facts of the case are undisputed, and the case presents simply the question of law whether, upon the facts, a liability rests on the city. . . . Where the case turns on the weight and effect of the evidence in proving or not proving facts necessary to support the action, and the evidence appreciably goes to prove such facts, it ought to go to the jury, as a verdict upon such evidence gives it a force which it might not have with the judge before verdict, and fortifies the case more against the action of the court, as the court cannot set the verdict aside unless plainly and decidedly contrary to or without evidence; but where the case is not such, but one of undisputed or indisputable facts, leaving it only a matter of law whether the facts show a liability on the defendant, the court should take the case from the jury, and direct a verdict, if the evidence shows no case for the plaintiff, because, if there were a verdict for him, it would be a finding against law, and the court always annuls a verdict against law upon conceded or indisputable facts."

For the reasons hereinbefore set forth we think the demurrers to both counts of the declaration must be sustained.

Demurrers sustained and case remitted to the common pleas division for further proceedings.

The Question Involved in the Principal Case is discussed in the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416-426; *Uthermolen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, and cases cited in the cross-reference note

thereto; *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, and cases cited in the cross-reference note thereto; *Thornton v. Maine State Agr. Soc.*, 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979; *McCaughna v. Owosso etc. Elec. Co.*, 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73.

McGARR v. NATIONAL AND PROVIDENCE WORSTED MILLS.

[24 R. I. 447, 53 Atl. 320.]

PARENT AND CHILD—Negligence—Loss of Service.—A widow who supports her minor child and controls its earnings is entitled to recover for the loss of its services caused by an injury negligently inflicted by a third person. (p. 751.)

PARENT AND CHILD—Right of Mother to Recover for Loss of Services of Child.—If it is agreed between the parents that the mother shall maintain, control, and receive the earnings of their minor child she is entitled to maintain an action for the loss of services of such child prior to the death of the father. (p. 752.)

NEGLIGENCE.—Evidence of precautions against further accidents taken after an accident is not competent to show antecedent negligence. (p. 758.)

NEGLIGENCE—Injury to Child—Measure of Damages.—In an action by a parent to recover for an injury to his minor child caused by negligence, the measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority, together with necessary costs and expenses incident to its care and cure, less its support and maintenance. No recovery can be had for the loss of the comfort and society of the child, nor for the physical or mental suffering of the parent caused by reason of the injury to the child. (p. 760.)

J. W. Hogan and P. S. Knauer, for the plaintiff.

W. B. Vincent and Huddy & Easton, for the defendant.

447 *TILLINGHAST, J.* This is an action of trespass on the case **448** for negligence, and is brought to recover damages for the loss of service of the plaintiff's minor daughter, Sarah McGarr, and also to recover for the expenses incurred by the plaintiff for medicines, medical attendance, and nursing, occasioned by reason of personal injuries sustained by said Sarah while in the employ of the defendant corporation.

Said Sarah McGarr, by her father and next friend Owen McGarr, had previously brought suit against the defendant to recover damages for personal injuries growing out of the accident in question (see *McGarr v. National etc. Mills*, 22 R. I. 347, 47 Atl. 1092), and had obtained a substantial verdict

therein; and thereafterward the mother, Annie McGarr, brought this action to recover for the consequential damages suffered by herself on account of said injuries to her daughter; and upon trial thereof, a verdict was rendered in her favor for the sum of nine thousand five hundred dollars.

The case is now before us upon the defendant's petition for a new trial upon the grounds: 1. That the verdict is against the law and the evidence; 2. That the presiding justice erred in admitting certain evidence against the objection of the defendant, and also erred in refusing to admit certain evidence offered by the defendant; 3. That the presiding justice also erred in his instructions to the jury; and 4. That the damages awarded by the jury were excessive and unjust.

At the trial of the case all of the questions involved, including the question of the defendant's negligence, were considered as fully as if there had been no prior verdict and judgment in favor of the daughter, Sarah McGarr.

The proof shows that she was employed by the defendant as a spinner, and at the time of the accident, January 6, 1899, was engaged in tending a spinning-frame in No. 6 mill of the defendant company. The spinning-frame was run by an overhead belt some ten feet from, and substantially parallel with, the floor. The claim of the plaintiff is that this belt, by reason of its improper and insufficient lacing, suddenly broke; and that one end of it struck her daughter upon the side of her head, inflicting severe injuries from which major hysteria developed, together with other physical ailments of a very serious and permanent nature.

⁴⁴⁹ Owen McGarr, the father of Sarah and the husband of the plaintiff, died on November 5, 1900.

Defendant's counsel starts out with the broad contention that the action will not lie, on the ground that the plaintiff, as the mother of said Sarah, is not entitled to maintain it: 1. Because she was not bound to support her child Sarah; and 2. Because the right of action for loss of service, having become vested in the father during his lifetime, could not become divested and vest in the mother after his death.

Having taken this position at the jury trial, the defendant objected to the introduction of any testimony as to damages. And as the trial court overruled this objection, subject to exception by the defendant, the first question which logically presents itself is whether the action will lie.

That at the common law the father is entitled to the benefit of his minor children's labor while they live with him and are supported by him, there can be no doubt. His right to their services, like his right to their custody, rests upon the parental duty of maintenance, and is said to furnish some compensation to him for his own services rendered to the child: Schouler's *Domestic Relations*, 5th ed., sec. 252; *Brown v. Smith*, 19 R. I. 319, 33 Atl. 466.

The mother, on the other hand, not being thus bound for the maintenance of her minor children, has no implied right, at the common law, to their services and earnings.

The common-law doctrine as thus briefly stated, however, has been greatly relaxed by modern decisions in this country, if not in England; and the strong tendency of the courts in this country, as well stated by Field, C. J., in *Horgan v. Pacific Mills*, 158 Mass. 402, 35 Am. St. Rep. 504, 33 N. E. 581, "is to give to a widow left with minor children, who keeps the family together and supports herself and them with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her to the extent of her ability much the same civil responsibility for their education and maintenance, as are given to and imposed on a father." The chief justice then stated the opinion of the court in that case to be as follows: "We are of the opinion that when a minor ⁴⁵⁰ child lives with its mother who is a widow, and the child is supported by the mother and works for her as one of the family, the mother is entitled to recover for the loss of services of the child and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant."

This statement of the law is abundantly supported by the authorities cited in the opinion, and by numerous others which might be added: See 17 Am. & Eng. Ency. of Law, 1st ed., 387, and cases collected in notes 1, 2; *Drew v. Railroad Co.*, 26 N. Y. 49; *McElmurray v. Turner*, 86 Ga. 215, 219, 12 S. E. 359; 2 Kent's Commentaries, 205, 206; *Nightingale v. Withington*, 15 Mass. 274, 8 Am. Dec. 101; *Natchez etc. R. R. Co. v. Cook*, 63 Miss. 38; *County Commrs. v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Kennedy v. New York Cent. etc. R. R. Co.*, 35 Hun, 186; *Morritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Mathews v. Missouri Pac. Ry. Co.*, 26 Mo. App. 75.

It being well settled, then, that a widow may maintain an action for loss of services of her minor child, the next question which arises is whether the plaintiff can maintain her action, the cause of which accrued prior to the death of her husband.

The answer to this question, in so far as it relates to the plaintiff's right to recover for loss of service, etc., prior to the death of the father, depends primarily upon the relation which existed between the mother and daughter at the time of the accident as to the right of service; that is, whether the mother or the father of the girl at that time was legally entitled to her services. And as the father was presumably entitled thereto, it devolves upon the plaintiff to prove that he had in some way relinquished his right or conferred it upon her. While the right to the child's services is naturally in the father, he can doubtless surrender this right to another by contract or otherwise, in various ways, as (a) by binding the child as an apprentice: *Ames v. Union R. R. Co.*, 117 Mass. 541, 19 Am. Rep. 426; (b) by allowing another person to so act that he stands in loco parentis: *Whitaker v. Warren*, 60 N. H. 26, 49 Am. Rep. 302. ⁴⁵¹ This principle is fully recognized in *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73, where it was held that the right of a parent to the services of his minor children "is bottomed on his duty to maintain, protect, and educate them. . . . But this right and this duty may be transferred to another, and may be relinquished to a child." The law doubtless is, however, that the father cannot permanently transfer his rights and duties to another except by deed: *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223.

The testimony upon which the plaintiff relies to show that the services of Sarah belonged to her at the time of the accident is to the effect that the plaintiff is and long has been the real head of the family; that she owns the property, takes care of the family, and pays the bills; and that, by express direction from the father in his lifetime, she was entitled to and did receive all of the earnings of the daughter Sarah. She employed the physician who has attended the daughter since the accident, and is personally responsible to him for his services. Dr. O'Keefe testifies that he rendered his services at the request of the mother; that the night he was called he saw the case would be prolonged, and he had a talk with the mother, and she told him she wanted him to attend her daughter and would see him paid, and that his services have been charged to her. The tes-

timony further shows that the father had no property, and no income except his current earnings.

In view of this state of the proof, plaintiff's counsel contends that the wages of Sarah were the property of the mother, for the recovery of which she could have maintained an action. In other words, the contention is that the arrangement and understanding between the father and mother of Sarah as to her wages, taken in connection with the other facts aforesaid, amounted to a relinquishment by the father of his right to the daughter's services and earnings and an assignment thereof to the mother, and hence that the latter can recover for the loss thereof.

We think this is so. It is true the evidence fails to show the making of any formal agreement between the plaintiff and her husband as to the child's services and earnings; but ⁴⁵² as it appears that there was an understanding between them to the effect that they belonged to the mother, and as it also appears that the mother managed the affairs of the family, owned the property, and contracted and paid the bills, we think this is sufficient to entitle her to maintain the action, not only for loss of services, etc., since the death of the father, but also prior thereto. If the case were one which simply showed the payment to the mother of the child's wages, by direction of the father, we should not deem this sufficient to enable the mother to maintain an action of this sort, as it is matter of common knowledge that for prudential and other reasons this is frequently done. But where, as in the case at bar, there is other evidence which, taken in connection with this, shows a relinquishment by the father of his right to the child's services and an assumption of his duties to the child by the mother, then she can maintain the action. In a leading New York case upon assignment of claim by husband to wife, the wife was allowed to collect, in an action for the recovery of the value of services, for work and labor done by plaintiff's husband and assignor for the defendant. In rendering its opinion the court said: "The defendant contends that the plaintiff's title to the claim in suit is invalid because acquired by assignment directly from the husband. While a different rule might prevail if the rights of the husband's creditors were concerned, transfers of personalty made by husband to wife are sustained as valid between the parties, and choses in action are held to pass by delivery from one to the other without a written assignment": *Seymour v. Fellows*, 44 N. Y. Sup. Ct. 126. This case was af-

firmed upon an appeal in an opinion written by Danforth, J., who said: "The appellant objects that the assignment of the cause of action having been made directly to the plaintiff by her husband is void. The rights of creditors are not in question, and we think the court below properly overruled the objection": *Seymour v. Fellows*, 77 N. Y. 179.

In *Harper v. Luffkin*, 7 Barn. & C. 387, the father was allowed to recover for the seduction of his married daughter, although her husband had not consented to his wife becoming the servant ⁴⁵³ of her father. In delivering the opinion of the court, Lord Tenterden, C. J., in speaking of the husband, said: "He may put an end to that relation of master and servant; but unless he interferes, it by no means follows that such a relation may not exist, especially as against third persons who are wrongdoers. It appears to me that such a relation might, and did, in fact, exist in this case; and that, in the absence of any interference by the husband, it is not competent for the defendant to set up his rights as an answer to the action."

In *Parker v. Meek*, 35 Tenn. (3 Sneed) 29, the mother was held entitled to recover for loss of services consequent upon the seduction of her daughter, who was twenty-four years of age, although the father of said daughter was living at the time of the seduction. In delivering the opinion of the court, McKinney, J., said: "Where the action is case, it is no more necessary in the case of a daughter of full age than in that of a minor that she should have been living in the family of the parent at the time of the seduction. Nor is it any more important in the one than in the other who was entitled to or enjoying her services at the time of the injury. The only inquiry of importance in either case is, On whom has the consequential injury fallen? And such person, whether father, mother or other person standing in loco parentis, is entitled to legal redress in the present form of action. . . . The present action may be maintained by the mother, although, by reason of the fact that the father was living at the time of the seduction and the seduced was at the time a member of his family and rendering service to him, the mother was not then nor could she be in law entitled to the services of the daughter. But the latter having remained with the mother, after the father's death, in the presumed relation of servant, and the trouble and expenses of lying-in having fallen upon her, the action is maintainable upon this ground."

In *Sargent v. Dennison*, 5 Cow. 106, the mother, who was a widow, bound her minor daughter by indenture as a servant until she should be eighteen years of age. During that period the daughter was seduced and the indenture canceled. ⁴⁵⁴ Thereupon the daughter returned to her mother, who then sued for seduction in an action on the case. The court held that upon the daughter's return the relation of master and servant was restored, and that it was not material who was entitled to the services at the time of the seduction, but "the real inquiry is upon whom has the consequential injury fallen, the expense attending her confinement and the loss of her services."

In neither of these cases was there any claim that the mother had actually acquired the right to the service of the child at the time of the injury, as is shown in the case at bar. Indeed, the right of recovery in those cases seems to be based upon a consequential injury independent of any such considerations. The last-named case was followed in *Ingersoll v. Jones*, 5 Barb. 661; *Bracy v. Kibbe*, 31 Barb. 273; *Gray v. Durland*, 50 Barb. 100; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441.

An examination of the numerous cases bearing upon the general question involved shows that the consensus of opinion is to the effect that, in cases of wrongful injury, whoever by reason of right or relationship suffers consequential damage thereby and may be liable for necessary expenses consequent upon such injury is entitled to recover against the wrongdoer the amount of such damages and necessary expenses. The right of recovery is based both upon the right to service and upon the liability to support and maintain the person injured where the result of the injury may be to render the person injured a public charge. The right to such recovery, in so far as it is based upon the liability to support the person injured, rests upon the pauper statutes, so called, beginning with 43 Elizabeth, which is as follows:

Chapter 2, section 7: "And be it further enacted that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner and according to that rate as by the justices of the peace of that county, where such person, ⁴⁵⁵ sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed, upon pain

that every one of them shall forfeit twenty shillings for every month which they shall fail therein."

Our own pauper statute (R. I. Gen. Laws, cap. 79, sec. 5), is a practical re-enactment thereof and is as follows:

"Sec. 5. The kindred of any such poor person, if any he shall have, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, or children by adoption, living within this state and of sufficient ability shall be holden to support such pauper in proportion to such ability."

A number of courts have upheld the right of one standing in loco parentis to a child to recover for loss of services of such child, resting such right upon the liability of such person for the maintenance of the child under statutes similar to 43 Elizabeth. Thus in *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762, the court said of a grandparent—and in that case it is pertinent to note that both the mother and putative father of the child were alive: "He is indeed not a parent but is chargeable by the poor laws with the duty of one. The rights of a parent are pupillary, and as they are given for the benefit of the child, the person in the exercise of them must necessarily have a correlative remedy for their infraction."

In *Mathewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339, the court said: "Our statute concerning the support of paupers by relatives imposes the obligation to provide for children alike on father and mother, making each liable if of sufficient ability: Gen. Stats., tit. 50, sec. 40. The provisions of this statute are taken substantially from 43 Elizabeth. If the right to receive the earnings of minor children, which is conceded to the father, be made to rest on the liability of the father for their support, the mother having the same liability should be entitled to the same right": See, also, *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Whitaker v. Warren*, 60 N. H. 26, 49 Am. Rep. 302; *Pacific R. R. Co. v. Jones*, 21 Colo. 347, 40 Pac. 891.

The uncontradicted evidence in the case at bar shows that the plaintiff has supported, cared for, and nursed her said ⁴⁵⁶ daughter Sarah since the happening of the accident in question, and also that she has lost the benefit of her services during all of said time. And we are of the opinion, and therefore decide, that, upon the facts and law as above stated, the rulings of the trial court, whereby the plaintiff was permitted to introduce evidence of loss of services, etc., from the date

of the accident, were correct and should be sustained. The exceptions to such rulings are therefore overruled.

Amongst the testimony which the plaintiff was permitted to introduce, subject to defendant's exception, bearing upon the question of the defendant's negligence in causing the accident, was the following, viz.: She was permitted to prove the manner in which the belt which broke and struck the daughter was subsequently repaired. The witness, Joseph Higginbottom, after having testified that at the time when the belt broke there was only one row of holes for the lacing in each end where it parted, was asked the following question: "Q. What did Mr. Smith do with the belt when he fixed it? A. He punched holes over again on each end of the belt. Q. When he punched them over again, how many rows of holes were there on each side? A. Two rows." Counsel for defendant objected to this, as it took place after the accident, saying: "They may have put on a new belt and done a great many things suggested by this accident, but you cannot put in testimony as to what occurred afterward. The question is whether this belt at the time was proper—that is all. Sometimes an accident may happen, and that may suggest for the first time that something else might be done." After considerable discussion by counsel upon both sides, the court ruled that the testimony was admissible. Last question read to witness, as follows: "Q. When he punched them over again, how many rows of holes were there on each side? A. Two rows of holes on each side. Q. On each side of what? A. Of the belt."

While there has been some difference of opinion in the courts of the several states upon the question whether it is competent for a plaintiff in an action of this sort to prove that changes were made after an accident, looking to the improvement ⁴⁵⁷ and safety of the appliance or structure causing the injury, it is now the "well-settled rule of law," as said by Rogers, J., in delivering the opinion of this court in the recent case of *Morancy v. Hennessey*, 24 R. I. 209, 52 Atl. 1021, "that evidence of precautions against further accidents taken after an accident, is not competent to show antecedent negligence."

In *Morse v. Minnesota etc. Ry. Co.*, 30 Minn. 465, 16 N. W. 358, the question here involved was fully considered, and, notwithstanding several previous decisions of the court to the contrary, it squarely and strongly took the ground that such evidence was not only inadmissible, but that its admission was sufficient ground for a new trial. The court said: "But on ma-

ture reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employés in making such repairs was not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

In *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309, Earl, J., in delivering the opinion of the court, used the following language, which is very pertinent to the case at bar: "After an accident has happened it is ordinarily easy to see how it could have been avoided; and then for the first time it frequently happens that the owner receives his first intimation of the defective or dangerous condition of the machine or structure ⁴⁵⁸ which caused or led to the accident. Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe, and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury. Hence in this court, and generally in the supreme court, it has been held erroneous to receive such evidence."

The recent Pennsylvania case of *Baran v. Reading Iron Co.*, 202 Pa. St. 274, 51 Atl. 979, discusses the question very fully and arrives at the same conclusion, stating, in summing up, that: "To the same effect are the decisions of nearly every state in which the subject has been considered." And this statement is well fortified by the numerous cases cited: See, also, *Corcoran v. Peekskill*, 108 N. Y. 151, reversing judgment for plaintiff; *Getty v. Town of Hamlin*, 127 N. Y. 636, 15 N. E.

309, reversing judgment for plaintiff; *Payne v. Troy etc. Ry. Co.*, 9 Hun, 526; *Nalley v. Hartford*, 51 Conn. 524; *Ely v. St. Louis etc. Ry. Co.*, 77 Mo. 34; *Hudson v. Chicago etc. Ry. Co.*, 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Hewitt v. Street Ry. Co.*, 167 Mass. 483, 46 N. E. 106. See, also, cases collected in "Negligence Rules, Decisions and Opinions," by Edward B. Thomas, pages 589-593, title, "Subsequent Acts and Statements."

Of course, the main purpose of the evidence introduced, as to the change in the manner of lacing the belt in question after the accident, was to show a recognition by the defendant of its negligence in not having properly laced it before the accident. And that such evidence might very naturally have been so taken and construed by the jury there can be no doubt. Its admission, therefore, was reversible error: *Graham v. Coupe*, 9 R. I. 478; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9; *Kolb v. Union R. R. Co.*, 23 R. I. 72, 91 Am. St. Rep. 614, 49 Atl. 392; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309.

But plaintiff's counsel argues in his brief that the testimony in question "was proper as showing the condition of the 459 joint at the time it broke, and explaining why it broke, and as corroborating the testimony of the witnesses Higginbottom and Sarah McGarr to the effect that this 'section-hand' who had charge of these belts was accustomed to make joints and lace them with only one row of holes punched upon either side."

Doubtless it did show, or strongly tend to show, why, in the judgment of the defendant's servant who repaired it, it was defectively fastened together; but, as already suggested, this knowledge might have been and probably was gained by reason of the accident, and hence cannot properly be attributed to the defendant before the accident happened. Its showing the condition of the belt at the time it broke and explaining why it broke, as argued, is not apparent; for at the time it broke it was, according to the testimony produced by the plaintiff, in a different condition, namely, there was but one row of holes in each end of the belt where it was laced, whereas afterward a second row of holes was punched in each end thereof and two rows of lacing inserted.

As to the testimony being proper as corroborating the testimony of the witnesses Higginbottom and Sarah McGarr, as argued, it is sufficient to reply that we know of no rule of evidence which permits a witness to be corroborated in this manner.

Plaintiff's counsel further argues that: "At all events, in view of the other testimony in the case, the admission of this testimony was harmless to the defendant, and so is no ground for a new trial." As already intimated, we cannot agree to this contention. On the contrary, we are of the opinion that it was very prejudicial to the defendant, and that its admission was such error as compels the granting of a new trial. The exception to the admission of the testimony now under consideration is therefore sustained.

A number of other exceptions were taken by the defendant to the admission and rejection of testimony during the trial; but an examination thereof fails to satisfy us that any of them are tenable, or that they are of sufficient importance to require special consideration.

460 There is an exception to the refusal of a request by the defendant to charge the jury, however, which we think should be sustained. We refer to the fourth request, which was as follows: "4. If the belt broke and passed over the girl's head without hitting her, the matter of lacing and inspection is not material." This request should have been granted. The only claim which the plaintiff alleges and declares upon, and the only one which the evidence tends to sustain, and hence, of course, the only one upon which she can recover, is that the belt broke and struck the girl, and thereby caused the injury complained of. It therefore necessarily follows that if she was not hit by the belt the action cannot be maintained. This exception is therefore sustained.

There is also an exception by the defendant to the granting of a request made by the plaintiff to charge the jury to the effect that damages might be awarded for loss of the society of the child caused by the accident. The court instructed the jury that if the plaintiff lost the society of the child "through the wrongful act of another, she would be entitled to recover for that." This was error. In an action of this sort the proper measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority, less its support and maintenance, together with the necessary costs and expenses incident to the care and cure of the child, such as those for medical and surgical attendance: 2 Sedgwick on Damages, 7th ed., 520, note b, and cases cited. But the jury are not at liberty to consider the fact that the plaintiff has been deprived of the comfort and society of the child, nor can they consider any physical or mental suffering or pain which may have been sustained by the parent by reason of the injury-

to the child: Louisville etc. Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010; Oakland Ry. Co. v. Fielding, 48 Pa. St. 320; Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633. In short, the measure of damages in such a case is the same as that which obtains in a case brought by a master for the loss of services of his servant or apprentice. It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no ⁴⁶¹ place therein. Moreover, in the case at bar, the plaintiff does not allege in her declaration that any damages were sustained by reason of the loss of the society of her daughter, but only that she sustained damages by reason of having been deprived "of the earnings and income and services of her minor daughter and servant," and in nursing and caring for her, as aforesaid.

In actions for the seduction of a daughter, and for the alienation of the affections of a wife, a different rule doubtless prevails, and damages may be recovered for the disgrace and humiliation brought upon the parent in the former class of cases in addition to those sustained by loss of service—Cooley on Torts, 2d ed., 271; 2 Greenleaf on Evidence, 16th ed., sec. 579; 3 Sutherland on Damages, 2d ed., sec. 1283—and for loss of the society and affection of the wife in the latter class. The defendant's exception to that part of the charge referred to is therefore sustained.

As we have come to the conclusion that a new trial must be granted there is no occasion for us to consider the other grounds upon which the defendant's petition is based, namely, that the verdict is against the evidence and that the damages awarded are excessive.

The verdict is set aside, and a new trial granted. Case remitted to the common pleas division for further proceedings.

In the case of *Schnable v. Providence Public Market*, 24 R. I. 477, 53 Atl. 634, the supreme court, on the authority of the principal case, affirmed the rule that in an action by a parent to recover for the death of his minor child caused by negligence, the measure of damages is the pecuniary loss sustained by the parent by reason of being deprived of his child's services during his minority. "Nothing can be given by way of solace for wounded feelings or for the bereavement suffered, and nothing for loss of society of the child."

For an Injury to a Minor Child, the father has a right of action for loss of services, expenses, and the like: *Meers v. McDowell*, 110 Ky. 926, ante, p. 475, 62 S. W. 1013; and so, it would seem, has a widow: See the monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 623. But it is held that a father has no right of action if the injuries do not impair the ability of the child to render services for him: *Hurst v. Goodwin*, 114 Ga. 585, 88 Am. St. Rep. 43, 40 S. E. 764.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

BYAS v. STATE.

[41 Tex. Cr. Rep. 51, 51 S. W. 923.]

AUTREFOIS ACQUIT—Striking out Plea of.—A plea of former acquittal is properly stricken out if the indictments show a former acquittal for a distinct offense from that for which the defendant is being tried. (p. 763.)

AUTREFOIS ACQUIT—Distinct Crimes.—A former acquittal for an attempt to commit a rape is not a bar to a prosecution for an attempt to commit a burglary for the purpose of committing the rape, although it was the same transaction. The two crimes are distinct. (p. 763.)

ALIBI—Attempt to Commit Burglary.—If, on a trial for attempt to commit burglary, the only proof of an alibi is defendant's denial that he was at the place where the crime was committed, no distinct charge upon alibi need be given. (p. 763.)

O. S. Lattimore, for the appellant.

R. A. John, assistant attorney general, for the state.

⁵⁴ HENDERSON, J. Appellant was convicted of an attempt to commit burglary, and his punishment assessed at two years' confinement in the penitentiary.

Appellant excepted to the action of the court in striking out his plea of former acquittal. He was indicted in this case for an attempt to commit burglary. The plea of former acquittal set up an indictment in two counts—the first charging him with an assault with intent to rape, and the second charging him with an attempt to commit rape. The plea alleged that it was one and the same transaction for which appellant was then being tried. On motion, the plea was stricken out, and appellant

reserved an exception. It has been held that it was competent for the court to strike out a plea of former acquittal where the indictments show that the former acquittal was for a distinct ⁵⁵ offense from that for which the party was being tried: *Wright v. State*, 37 Tex. Cr. Rep. 627, 40 S. W. 491; *Wheeler v. State* (Tex. Cr. App.), 38 S. W. 182. Counsel insists, however, that appellant could have been convicted under the former indictment for an attempt to commit rape, and this would be a bar. The allegation was that it was one and the same transaction, and he refers us to the case of *Herera v. State*, 35 Tex. Cr. Rep. 607, 34 S. W. 943. That was a case in which the defendant had been previously convicted for an assault with intent to murder, and had served his time, and was afterward put on trial for the same transaction on a charge of robbery. We there held that the plea of former conviction for assault with intent to murder, involving the same transaction, was a good plea in bar. But we do not believe it is applicable to this case. An attempt to rape by force, as defined by our statute, requires the same character of force as in an assault, but goes beyond mere preparation, and stops short of the assault itself. This definition was thoroughly discussed in *McAdoo v. State*, 35 Tex. Cr. Rep. 603, 60 Am. St. Rep. 61, 34 S. W. 955. Evidently an attempt to commit a rape apprehends that the party is in a situation to make an assault; that is, conceding that an attempt to commit a rape by force is sufficiently defined by the statute, and can be committed at all. An attempt at burglary for the purpose of committing rape does not apprehend that the party is in a situation to commit either an attempt to rape or an assault with intent to commit rape. The charge of an attempt to commit a burglary for the purpose of committing a rape apprehends that the party attempting the burglary must commit it before he can commit the ulterior offense. Though, on the former trial, proof may have been made of the attempted burglary, as part of the *res gestae*, yet if the case had stopped there, there would have been no proof of an attempt to rape, or of an assault with intent to commit a rape, because the party must make a breach of the house before he could do either. And if, on a former trial, the proof had stopped with an attempted burglary of the house, the court should have instructed an acquittal. These are as much distinct offenses as burglary and theft, or as forgery and uttering a forged instrument, and a conviction or acquittal of the one is not a bar to the prosecution of the other. The court did not err in striking out the plea.

Appellant excepted to the charge of the court because it failed to submit the question of alibi to the jury. It appears that appellant excepted to the charge of the court, as given, for the reason that it failed to charge on alibi. The court informed counsel that if he really desired such a charge, and would prepare it, the court would give it, although the court thought it doubtful whether such a charge was applicable, from the facts proved on this trial. We have examined the record carefully, and in our opinion such a distinct charge was not required. We do not understand that appellant offered any affirmative proof that he was elsewhere at the time of the alleged attempt at burglary, further than that he denied being at the place when it was ⁵⁶ committed. He was evidently in that vicinity, according to the testimony of his own witnesses. The general charge of the court that they should acquit defendant unless they believed "from the evidence beyond a reasonable doubt, that defendant did by force attempt to enter the house mentioned in the indictment, and that it was then and there his intention to have carnal knowledge of the said Ella Garrett by force, and without her consent," and the court's charge on reasonable doubt, we think, was sufficient. We have examined the court's charge in connection with the special requested charges, and in our opinion the charge of the court sufficiently covered all the material issues in the case, and none of the requested charges were necessary. No error appearing in the record, the judgment is affirmed.

The Identity of Offenses in a plea of former jeopardy is the subject of an extended note to People v. McDaniels, 92 Am. St. Rep. 89-159.

AUGUSTINE v. STATE.

[41 Tex. Cr. Rep. 59, 52 S. W. 77.]

AUTREFOIS ACQUIT—Murder by Distinct Acts.—If the killing of two persons is by distinct and separate acts, though done at the same time and as part of the same transaction, an acquittal for the killing of one is not a bar to a prosecution of the same person for the killing of the other. (p. 768.)

MURDER—Instructions.—If a case stands out in relief as murder in the first degree, the court is justified in charging generally only on murder in that degree, but even in such a case, the court should charge on murder in the second degree, and when it does the accused cannot complain as the latter charge is in his favor. (p. 769.)

MURDER.—Failure to Charge on Circumstantial Evidence is not error when the evidence shows the killing, and the accused's participation therein by positive testimony. (p. 769.)

MURDER—Conspiracy—Charge.—If the evidence in a murder case suggests a conspiracy, it is not error for the court to fail to charge as to that if the charge given on principals is sufficiently comprehensive. (p. 769.)

TRIAL—Change of Venue.—A statute authorizing the judge to change the venue on his own motion leaves this matter entirely within his discretion, and it is not a matter to be controverted by evidence. (p. 769.)

CONSTITUTIONAL LAW—Title of Act.—The title of "an act to define and punish murder by mob violence, to fix the venue and regulate proceedings in such cases, and to provide for the suspension and removal of sheriffs who permit it, and fix the venue and regulate proceedings in such cases, is not unconstitutional as embracing more than one subject, nor does it attempt to create a new offense of murder. (p. 770.)

CONSTITUTIONAL LAW—Construction of Statutes.—If a statute is ambiguous, or susceptible of several different constructions, it is competent for the courts to study the history of the bill in its progress through the legislature by appealing to the legislative journals, in order to reach a correct interpretation of the meaning of the statute. (p. 772.)

CONSTITUTIONAL LAW.—Statutes must be Capable of Intelligent Construction and interpretation, otherwise they are inoperative and void. (p. 772.)

CONSTITUTIONAL LAW—Construction of Statutes.—If a law is framed in indefinite or uncertain terms, the courts are authorized to appeal to all of the rules of construction in order to ascertain whether it is in such condition as to be enforced. (p. 775.)

CONSTITUTIONAL LAW—Interpretation of Statutes—Indefiniteness.—If a statute is so indefinitely framed, so uncertain in its terms, and of such doubtful construction that it cannot be understood or intelligently interpreted, either from the language in which it is expressed or from any written law, it must be declared inoperative and void. (p. 776.)

R. Kleberg, A. B. Storey and E. R. Kene, for the appellant.

Fly & Hill and R. A. John, assistant attorney general, for the state.

67 HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at twenty-five years' confinement in the penitentiary, and he appeals.

Appellant was indicted in the district court of De Witt county at the December term, 1891, for the murder of Philip Brassell, alleged to have been committed in said county on the 19th of September, 1876. In 1893 the venue of the case appears to have been changed from De Witt to Gonzales county. In July, 1896, the venue of the case was changed from Gonzales to Hays county, where the trial and conviction in this case subsequently occurred. The theory of the state, which was supported by evidence, shows that the killing was done at night, by a crowd of armed men who came to the house of deceased, masked, and took deceased and his three sons from their home, under the pretext of being shown the way to a neighbor's house. When they had proceeded a short distance from the house, deceased and his sons refused to go any farther, and thereupon deceased and his oldest son were shot down. The two younger sons were permitted to escape. The state's testimony shows that there were ten or fifteen persons in the crowd. Several were identified; among others, defendant. The state's evidence also tends to show that defendant fired the shot which killed deceased, Philip Brassell. No special grudge was shown between defendant and deceased, but the homicide appears to have been committed on account of a feud existing between certain factions in De Witt county at the time, appellant and his companions being on one side, and deceased belonging to the other faction. Appellant relied on his plea of not guilty, under which he claims that the state's evidence failed to identify him as one of the parties composing the alleged mob, and he introduced evidence of an alibi.

Appellant's first proposition is that the court erred in not setting aside the verdict, because the same was contrary to the evidence, in finding that appellant's plea of former acquittal was not true. Appellant claimed that he was entitled to a verdict of not guilty on his plea of former jeopardy in that he had been previously tried and acquitted **68** for the same offense. By an examination of the record it appears that George Brassell was killed at or about the same time that Philip Brassell was,

and by the same parties. The testimony tends to show that the shot which killed George Brassell was fired by another one of the party, and that the shot which killed deceased, Philip Brassell, was fired by appellant. The proof showed that appellant had been tried and acquitted of the murder of George Brassell; and it is claimed that, said acquittal being a part of the same transaction, his acquittal in that case of that homicide is an acquittal in this case, and is a good plea in bar. This contention might be urged with some force if the killing of both parties was done by one and the same act; that is, if the proof showed that but one shot was fired, and it caused the death of both Philip and George Brassell, then it might be a good plea in bar. But here the testimony shows that the parties were killed by distinct acts. Mr. Bishop says: "Obviously there is a difference between one volition and one transaction, and on the view of our combined authorities there is little room for denial that in one transaction a man may commit distinct offenses of assault or homicide upon different persons, and be separately punished for each": 1 Bishop's New Criminal Law, sec. 1061; Rucker v. State, 7 Tex. App. 549; Chivarrio v. State, 15 Tex. App. 330; Forrest v. State, 13 Lea, 103; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; Teat v. State, 53 Miss. 439, 24 Am. St. Rep. 708.

Appellant complains that the court erred in refusing to give his special charges to the effect that, if the jury believed beyond a reasonable doubt from the evidence that the killing of Philip and George Brassell was one and the same transaction, the defendant, having been acquitted on the charge of killing George Brassell, they should find in favor of defendant's plea of former acquittal. From what has been said before, we do not believe the court was required to give a charge on this subject at all, inasmuch as the proof showed that the killing of said two parties, although in the same transaction, was by two distinct acts. The court gave a charge based on the killing in one transaction in pursuance of a conspiracy, and instructed the jury, in effect, that if the defendant and several other persons conspired together, and agreed and planned the killing of Philip and George Brassell, and in pursuance of such plan and design they killed them, at the same time on the same occasion, such offense, although two persons were killed by two distinct persons, would be but one act and but one transaction, and no person tried for the murder of either one of the parties is subject to a second prosecution and trial for the murder of the other party killed; "and if you find the facts to be such, you

will return a verdict sustaining the special plea of defendant, although you may believe that Dave Augustine was one of the persons planning the offense, and that he actually killed Philip Brassell." And the court then instructed the jury the converse of said proposition—that is, if Philip and George Brassell were killed at the same time, and by the same party, but not in pursuance of a previously planned conspiracy, the ⁶⁹ killing of said parties would be distinct acts and separate offenses; and, if they found the killing occurred under such circumstances, to find against appellant's special plea. We do not think that in this matter the court announced a correct legal proposition; for, notwithstanding the conspiracy as planned by them, if the killing of two persons is by distinct and separate acts, though done at the same time, and as a part of the same transaction, the acquittal for the killing of one of said parties is not a bar to a prosecution for the killing of the other. The conspiracy has nothing to do with it, for two persons were killed by distinct and separate acts, as we have seen above. The charge of the court, however, could not have prejudiced appellant, because the jury were instructed to acquit him on the special plea if they found that the killing was in pursuance of a previously planned conspiracy. They evidently found, if they obeyed the charge of the court, that there was no previous conspiracy. That, however, as we have seen, would be no defense and whether or not their finding is sustained by the proof makes no difference.

Appellant contends that the court erred in charging the jury on murder in the second degree, on the ground that there was no evidence to authorize such a charge. We are referred to no authority in this state, but to a Missouri authority—*State v. Punshon*, 124 Mo. 448, 27 S. W. 1111. We do not understand said case to support the contention of appellant. It holds that when the evidence shows that defendant, if guilty, is guilty of murder in the first degree, and defendant requests an instruction that the jury shall find defendant not guilty, unless they believe he willfully and with malice aforethought shot deceased, it is not error to modify such instructions to the effect that the jury shall find him "not guilty of murder in the first degree." But, whatever may be the doctrine in Missouri, we do not think it is the doctrine in this state. The two degrees of murder are so closely allied, the dividing line sometimes being of such a shadowy character, that it has been held that it is best in every case to charge murder in both degrees. Of course, where the

case stands out in relief as murder in the first degree, the court will be justified in charging only murder in the first degree; but even in such a case the court should charge murder in the second degree. We fail to see how appellant could complain, as the charge would be in his favor: *Blake v. State*, 3 Tex. App. 581; *Powell v. State*, 5 Tex. App. 234; *Jones v. State*, 29 Tex. App. 338, 15 S. W. 403; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108.

The failure of the court to charge on circumstantial evidence was not error, inasmuch as the evidence showing the killing of Philip Brassell, and appellant's participancy therein, was by positive testimony. Sylvanus Brassell testified that he saw appellant when he rode up from the south and shot his father, while he was looking at one Meadows, a codefendant; that his father was just in the act of falling when he turned to leave. Now, the fact that Philip Brassell was found the ⁷⁰ next morning a little distance from where he was shot and fell makes no difference; nor does it make any difference that he was afterward shot by others of the party. He was killed by distinct and separate shots from those which killed George, as the same witness, Sylvanus Brassell, testified to seeing Meadows shoot George Brassell about the time his father was shot by defendant. This, it occurs to us, was positive evidence of the homicide, and did not require a charge on circumstantial evidence.

Appellant further assigns as error that the court erred in not defining the law of conspiracy. While, undoubtedly, the evidence suggested a conspiracy, yet it was not necessary for the court to define this matter. The charge given on principals was sufficiently comprehensive.

Appellant complains of the action of the court in changing the venue from De Witt to Gonzales county, and also in changing the venue from Gonzales to Hays county; and exception appears to have been reserved in the order changing the venue. The venue was changed on the court's own motion, and on sufficient grounds, as stated in the order. There does not appear to us any abuse in the discretion of the judge in this regard: Code Crim Proc., art. 613. There appears a separate motion in the record in connection with the change of venue from De Witt to Gonzales county, controverting the grounds assigned by the court for the change of venue, and asking to submit proof; but this is not embodied in any bill of exceptions—that is, no bill of exceptions shows that the court refused to receive proof on this issue. But we take it that the statute authorizing the

judge to change the venue on his own motion leaves this matter entirely within the discretion of the judge, and is not a matter to be controverted by evidence. Of course, if a clear case of oppression prejudicial to the rights of appellant was presented by affidavits, or proof offered setting up this character of case, and a proper bill of exceptions was reserved to the action of the court, we are not prepared to say that this court would not revise an improper and oppressive action of the lower court. As was said in *Bohannon's Case*, 14 Tex. Ap. 271: "The discretion conferred upon district judges by the article in question is not restricted or controlled by article 618, and whether such discretionary authority is a dangerous power is not a question for judicial determination. No instance of its abuse has ever been made manifest." The exercise of this power to change the venue from Gonzales to Hays county was as much authorized by article 613 as the original change of venue, and what we have said heretofore relates as well to the latter change as to the former.

It is not necessary to discuss the objection to the verdict of the jury on the ground that "penitentiary" is spelled in the verdict as follows: "peintentiary": See *McGee v. State*, 39 Tex. Cr. Rep. 190, 45 S. W. 709.

Appellant contends that the evidence discloses that this was a murder by mob violence. In that connection he insists that the act of the twenty-fifth legislature (Gen. Laws, Spec. Sess., 25th ⁷¹ Leg., 40) carves out and defines a distinct offense, to wit, murder by mob violence; and that all prosecutions for said offense, as provided by the first section of said act, cannot be commenced and prosecuted in the county where such offense may have been committed, but must be commenced and prosecuted in some other county; that the act, by its express terms, repeals all acts in conflict therewith, and contains no saving clause with reference to prosecutions existing at the time it went into effect. It is accordingly insisted that it applies to this prosecution, which was commenced in the county of De Witt, where the alleged offense was committed. He further contends that the act is not unconstitutional on account of its caption. We concede the constitutionality of the act in question, so far as its caption is concerned—that is, that "An act to define and punish murder by mob violence; to fix the venue and regulate proceedings in such cases; and to provide for the suspension and removal of sheriffs," etc., "who permit it, and fix the venue and regulate proceedings in such cases"—is not un-

constitutional as embracing more than one subject: See *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182, 11 S. W. 108; *Albrecht v. State*, 8 Tex. App. 216, 34 Am. Rep. 737. We do not believe that the object of the act in question was to create a new offense of murder. For a mob to execute a person was formerly murder under our statutes defining that offense, and it is none the less so under the new act. By reference to the act itself, an analysis of sections 1 and 2 will show that it was not the intention of the lawmakers to create a new offense, but merely to give venue to a certain character of murder, to wit, murder by mob violence. This sort of murder is punishable the same as murder formerly was under our statutes, to wit, death or confinement in the penitentiary for life, or according to the degree of murder. The indictment must set out an accusation of murder, and the jury must find the degree of murder, in order to mete out the punishment. This is further manifest by the last clause of section 1 of the statute, which leaves the law of manslaughter unaffected; that is, we take it that, although murder be committed by a mob, if the party committing it do so in the heat of passion, superinduced by adequate cause, as defined by law, such person may be convicted, under the indictment, of only manslaughter. The second section of the law in question provides that prosecutions for murder under this act may be commenced and carried on in any county in the judicial district in which the offense is committed, except the county of the offense, etc. The indictment, as we understand it, must charge a murder, and then charge that it was done under circumstances to constitute it a murder by mob violence, in order to be a good indictment; and when an indictment is drawn in such case, according to the terms of the statute, if it is presented in the county where the offense was committed, it will be dismissed for want of jurisdiction. If a homicide is committed in a county under circumstances which constitute it murder by mob violence, and a party is indicted for murder merely, without the recitations constituting it murder by mob violence, yet, if it ⁷² is shown in proof that the homicide was committed under circumstances to constitute it murder by mob violence, the prosecution equally cannot be maintained, but must be begun in the proper county. So we take it that the aim and purpose of the statute were not to create a new offense, but to give venue to cases of murder committed under certain circumstances to other counties than the one where such homicide was committed.

This brings us to the question, What is murder by mob violence? That is, what did the legislature mean by "mob violence," and what character or kind of murder did they intend should not be prosecuted in the county where it was committed, but in some other county? This matter was somewhat discussed in *Alexander v. State*, 40 Tex. Cr. Rep. 395, 49 S. W. 229, 50 S. W. 716. The exact point decided in that case was that, where two or more persons, out of some private grudge, conspire to kill another, and in pursuance of such purpose do kill him, that it is not a murder by mob violence, as contemplated by the statute of 1897. But we therein indicated that the terms of said statute on mob violence, as construed, were intended to include only cases in which a mob should take from the custody of some officer one accused of crime, or possibly one charged with crime, or who had committed a crime, though not under arrest, and execute him by violence. In discussing our views restricting the act in question within such bounds, we referred to the history of the times which superinduced the act, and we also appealed to the message of the governor which accompanied the act. We have since followed the act through the journals in all its details to its final consummation as the completed will of the legislature, and we are constrained to change our views as heretofore expressed. We take it to be a rule of construction in the interpretation of laws, where the statute is ambiguous, or susceptible of several different constructions, it is competent for the courts to study the history of the bill in its progress through the legislature by appealing to the legislative journals: Black on Interpretation of Laws, sec. 91; Endlich on Interpretation of Statutes, sec. 31. The act in question originated in the House. The governor sent a special message to the House, accompanying the same with a prepared bill on the subject. Said bill was reported favorably by the committee. The first section thereof related to rapes. This was subsequently stricken out, and the sections of the bill were rearranged, the second section becoming the first section. Said section is as follows: "Every person with sound memory and discretion, who shall kill any reasonable creature in being in this state, or participate in such killing, or aid in any manner therein, when the person so killed is accused of crime, or is in the custody of the officers of the law, or is taken therefrom by violence, shall be deemed guilty of murder by mob violence," etc. This bill, with this provision, passed the House, and went to the Senate. It was reported favorably to that body by the committee. When

it came before the Senate, it was amended by the following substitute for section 1, to wit: "Section 1. Whenever two or more persons shall combine ⁷³ together for the purpose of mob violence, and in pursuance of such combination shall unlawfully and willfully take the life of any reasonable creature in being, by such violence, such person shall be deemed guilty of murder by mob violence, and upon conviction thereof, shall be punished," etc.: Senate Jour. 25th Leg. Spec. Sess., pp. 119, 120. Two attempts were subsequently made in the Senate to amend said section by confining the operation of the act to cases where the person killed is accused of crime, or is in the custody of the officers of the law; but these amendments were defeated: Senate Jour., 25th Leg., Spec. Sess., pp. 120, 121. So it will be seen that the Senate distinctly repudiated that provision of the House bill which sought to confine the operation of the act to cases where a mob executed some person charged with crime, or in custody of the officers of the law under a charge of crime. The bill, as thus amended, passed the Senate, and was sent back to the House, by which body, in its amended shape, it was passed, received the governor's approval, and became a law. So it would seem that we are driven to the irresistible conclusion that the legislature not only did not intend to confine the acts of mob violence to the execution by mobs of persons accused of crimes, or to the rescuing of persons accused of crime from officers and their execution, but intended to give the act in its operation a greater latitude; and we understand it to be insisted that the act in question embraces every case of murder by mob violence, and that every murder committed by two or more persons, who have combined together for the purpose of mob violence, and in pursuance of such purpose shall willfully take the life of some other person, that every such case can no longer be prosecuted in the county where it occurred, but must be prosecuted in some one of the counties named. We are thus confronted with the question, What did the legislature mean when it used the term "murder by mob violence"? If it intended to change our law in respect to venue in murder cases, and to authorize the prosecution in such cases where two or more persons combine together beforehand to kill a person, or do some serious bodily violence the natural consequence of which would likely produce death, and in pursuance of such purpose do kill him, to be carried on in some other county than the county of the offense, then it would work a radical change in our law, and would be productive of a great deal of confusion. Still, if

this is the plain reading of the enactment, we understand it to be our duty in administering the law to carry out the legislative intent, no matter what complications might arise: Sutherland on Statutory Construction, secs. 321, 324; Black on Interpretation of Laws, 105; Endlich on Interpretation of Statutes, sec. 266. On the other hand, a statute must be capable of intelligent construction and interpretation, otherwise it will be inoperative and void. "The court must use every authorized means to ascertain and give it an intelligible meaning; but if, after such effort, it is found to be impossible to solve the doubt and dispel the obscurity, and if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to explain or make one. The court may not allow conjectural interpretation to usurp the place of judicial ⁷⁴ exposition. There must be a competent and efficient expression of the legislative will. . . . If the terms in which a statute is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible": Black on Interpretation of Laws, p. 75, sec. 36. In consonance with these general views as to the interpretation of statutes, our constitution provides that every indictment must state the nature of the accusation against a defendant, and it has been held that a statute violative of its provisions is inoperative and void. And again, our Penal Code, article 6, provides: "Whenever it appears that the provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed or from some other written law of the state, such penal law shall be regarded as wholly inoperative": And see, also, Pen. Code, arts. 7, 9.

Now, the question occurs, Is this law, authorizing a change of venue in all cases of murder by mob violence, plain and intelligible on its face, or is it framed so indefinitely and in such doubtful language that, judged by itself, or in connection with other laws, it appears ambiguous on its face, and to lead to results never contemplated by the legislature? The act uses the term "mob violence," and we have searched the books in vain to find where this combination of words has ever been defined. If we transpose the words and say that mob violence means violence by a mob, and that this in turn means some physical injury by a mob, then we are equally at a loss to differentiate a violence committed by a mob or by a person. The character of in-

jury would be the same, whether committed by one or more persons. If we say that the legislature intended to take the prosecution away from the home county in every case where two or more persons plan to do another a physical injury, and in pursuance of such purpose willfully kill such person, it would embrace a multitude of cases, evidently never contemplated by that body. Such was not within the evil intended to be provided against. In line with this view, the statute itself is in derogation of common right; for it is traditional with our government, and all our laws with reference to venue are founded upon the idea, that it is the privilege of every citizen to be tried in the vicinage—that is, the county—where the offense was committed, by a jury of his peers. This act, if given the latitude claimed for it, would change this rule in a great number of murder cases; so that, under its operation, in every case of homicide where the proof showed that it was done by two or more persons in pursuance of a plan formed beforehand, the citizen could no longer be prosecuted in his home county, but *ex necessitate* must be carried to some other county for trial. As stated before, it must be competent for the legislature to do this; but, before we would be willing to ingraft such a rule of construction, the intention of the law-making power intending this result should very clearly appear. ⁷⁵ We mention this because, when a law is framed in indefinite or uncertain terms, we are authorized to appeal to all the rules of construction in order to see whether or not it is in such condition as to be enforced. We have seen before that the legislature refused to pass the law confining the provisions of the act to the murder by mobs of persons accused of crime. They repudiated this view, and substituted another provision. But the question is, where did they intend to stop? They refused to define what “mob violence” should consist of, but left this term of uncertain meaning for the courts to define, and say to what character of cases this question of venue should apply. The books define a mob as an assemblage of many people acting in a tumultuous and riotous manner, calculated to put good citizens in fear and in danger of their persons and property. In common acceptance it is an unorganized assemblage, a disorderly crowd, etc.: See *Rapalje & Lawrence’s Law Dictionary*; 15 *Am. & Eng. Ency. of Law*, 698. This act, instead of considering a mob as a multitude without organization, makes a mob consist of as few as two persons, and apprehends some sort of organization, for the language of the act is, “if two or more persons combine.” In both respects the act

is a departure from the ordinary definition of a mob. The purpose of the mob, as we have seen, must be to do some injury or violence to another; and if, in pursuance of such purpose, they kill such person, whether they intend such result or not, the act denounces such persons as guilty of murder by mob violence. To illustrate: under this latitude of construction, if two or more persons from any motive combine to merely whip a person, and in pursuance of such whipping they willfully kill such person, though not intending this result, the provisions of the act apply, and the parties cannot be prosecuted where it occurred. Under the general provisions of our law, such persons might be guilty only of manslaughter; but the act exempts from its operation the offense of manslaughter. And again, if the parties, or some of them combine together to kill some other on account of an insult to a female relative, and in pursuance thereof take the life of such person, the persons actuated by such motive, under our statutes, might be guilty of only manslaughter, and, being exempted from the provisions of the act, must be prosecuted in the home county and not in one of the other counties named. So we see that in giving effect to the provisions of said act, with this latitude of construction, we are met with difficulties and complications. If the act is held to apply to every homicide committed by two or more persons in pursuance of some previous combination, then the venue of every such case is no longer in the home county, but the prosecution must be begun and maintained in some of the adjoining counties named. If, on the trial, proof of combination or conspiracy should fail, then the prosecution in that county cannot be maintained. Indeed, the question of venue would ramify our whole law of homicide, and produce inextricable confusion. While, as we have seen, the legislature refused to restrict the operation of the act to the killing ⁷⁶ of a person in the hands of an officer, or accused of crime, and failed to place any other limitation on the act, yet we cannot believe that they intended to give it the scope claimed for it. As we have seen, the act is not complete within itself, but we are required to appeal to another law, to wit, the law of murder, in order to explain and give it force; but the law of murder furnishes no light as to what the legislature intended by mob violence, and we appeal to all other laws on our statute books in vain to ascertain what the legislature meant by the term "mob violence." To hold that the act was intended to embrace every killing by two or more persons in pursuance of a previously formed design to kill, or to inflict some injury

which resulted in killing, would lead to grave results, evidently never intended by the legislature, calculated to produce complications and confusions, and which, while remedying no evil, would destroy rights and create vexations and oppressions. The effect would be, not only to harass the citizen by requiring him to be prosecuted in some other county than where the offense was committed, in a great number of cases evidently never contemplated by the legislature, but would impair the efficiency of the law and the administration of justice in the courts, if we gave it such latitude of construction as is here claimed. As presented, we believe that the act in question is so indefinitely framed, and is of such doubtful construction, that it cannot be understood, either from the language in which it is expressed or from any written law of this state. We have given this question much thought and study, and we confess to being unable to solve the difficulty, and to determine what the legislature really meant by the term "mob violence," or what character of cases they intended the act should embrace. It is so uncertain in its terms as to escape intelligible construction, and we therefore declare it inoperative and void. Now, if this be a correct interpretation of the law, it settles this case, and it is not necessary for us to discuss whether or not, if the act was operative, it would be retroactive, and render nugatory all prosecutions against mobs for murder begun before the passage of the act in question. There being no error in the record, the judgment is affirmed.

Former Jeopardy.—The principal case is cited with other decisions on the question of the identity of offenses in a plea of former jeopardy, where there is an assault or killing of several in one transaction, in the monographic note to *People v. McDaniels*, 92 Am. St. Rep. 121. See, too, *Cook v. State*, 43 Tex. Cr. Rep. 182, post, p. 854, 63 S. W. 872.

Title of Statute.—A statute may include every matter germane to, and in furtherance of, the general subject expressed in the title; and the enumeration of the details of the subject is not fatal to the title of an act. See the monographic notes to *Crookstan v. County Comms.*, 79 Am. St. Rep. 460-464; *Babel v. People*, 64 Am. St. Rep. 70-107. The titles of amendatory statutes are given especial consideration in the monographic note to *Lewis v. Dunne*, 86 Am. St. Rep. 267-279.

Construction of Statutes.—When a statute is plain and unambiguous, courts are not permitted to search for its meaning beyond the statute itself: *Witte v. Koeppen*, 11 S. Dak. 598, 74 Am. St. Rep. 826, 79 N. W. 831. But if the meaning is obscure, a resort to external evidence is proper: *Funk v. St. Paul etc. Ry. Co.*, 61 Minn. 435, 52 Am. St. Rep. 608, 63 N. W. 1099; *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174, 41 N. E. 145. The proceedings of a constitutional con-

vention may be referred to to ascertain the meaning of a clause in the constitution: *Note to Riggs v. Palmer*, 12 Am. St. Rep. 827. But the evidence of a member of the legislature which passed an act, touching its meaning and purpose, is not admissible in construing the statute: *Stewart v. Atlanta Beef Co.*, 93 Ga. 12, 44 Am. St. Rep. 119, 18 S. E. 981. The court should use every authorized means to ascertain the meaning of a statute before it for interpretation, but if it is found impossible to absolve the doubt and dispel the obscurity, the law will be held inoperative: *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 652.

BLACKWELL v. STATE.

[41 Tex. Cr. Rep. 104, 51 S. W. 919.]

SWINDLING—Drawing Check on Bank Without Funds Therein.

It does not constitute the crime of swindling or any violation of law simply to draw a check on a bank where the drawer has no money on deposit. There must be some false and deceitful means resorted to at the time that a person obtains the money on the check, as representing that he has money in the bank or that the check must necessarily be cashed, or otherwise, to constitute a crime. (p. 779.)

R. A. John, assistant attorney general, for the state.

104 BROOKS, J. Appellant was convicted for swindling C. W. Zenker out of the sum of twenty dollars, and his punishment assessed at one day's imprisonment in the county jail and a fine of one hundred dollars. The charging part of the information is, in substance, as follows: That R. E. Blackwell, by means of false pretenses and devices and fraudulent representations, then and there knowingly and fraudulently made by him to Will Hennersdorf, agent and employé for C. W. Zenker, did induce the said Hennersdorf to deliver to said Blackwell, by the means aforesaid, the sum of twenty dollars in lawful money of the United States, upon the representation that he, the said Blackwell, had money in the San Angelo National Bank of San Angelo, Texas, and wanted a San Angelo National Bank check, which said Hennersdorf gave to said Blackwell; and the information then goes on and states that said Blackwell gave the said party a check on said bank for twenty dollars, when in truth and in fact he did not have any money in said bank, and that the said sum of twenty dollars was delivered to said Blackwell upon said false and fraudulent pretenses, etc. In the above we have only stated the substance of the information. However, the information and complaint **105** are in due form. On the

trial, the witness, Will Hennersdorf, who is the main prosecuting witness, instead of testifying to the facts set out in the complaint and information, in his testimony, among other things, states: "If the defendant told me at that time when I cashed the check that he had any money in the bank on which it was drawn, I do not remember it." And further he stated: "No, I do not remember having cashed the check on the representations of the defendant that he had any money in the bank, for I do not remember that he made any representation to that effect, but cashed it on the check, believing it to be good. I thought from defendant's statement about having cattle at the depot that he was a cattleman, and supposed his check was good. I do not remember any statement he made, other than his statement about having cattle at the depot." We find no statement in the record controverting the testimony of the main prosecuting witness. There is no evidence in the record to support the verdict. It is not a violation of the law simply to give a check on a bank where a party has no money; but there must be some false and deceitful means and method resorted to at the time the party obtains the money upon the check, such as representing that the party has money in the bank, or that the check will necessarily be cashed, or something of this kind: *Ayers v. State*, 37 Tex. Cr. Rep. 1, 38 S. W. 792; *Martin v. State*, 36 Tex. Cr. Rep. 125, 35 S. W. 976. No evidence appearing in the record to support the verdict, the judgment is reversed and the cause remanded.

The Principal Case is supported by *Brown v. State*, 37 Tex. Cr. Rep. 104, 66 Am. St. Rep. 794, 38 S. W. 1008. But see *State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777; monographic note to *Barton v. People*, 25 Am. St. Rep. 380.

MISCHER v. STATE.

[41 Tex. Cr. Rep. 212, 53 S. W. 627.]

CONSTITUTIONAL LAW—Place of Trial.—A statute authorizing the prosecution of the offense of rape in some county other than the one where the crime is committed or in some county of the district, does not violate that clause of the national constitution which provides that in criminal prosecutions the accused shall enjoy the right to a speedy trial in the district in which the crime shall have been committed. Such limitation applies only to procedure in the national courts and not to procedure in state courts as to crimes committed within the state. (p. 782.)

CONSTITUTIONAL LAW—Venue in Rape.—A statute authorizing the prosecution of the offense of rape in some county other than the one in which the crime is committed, or in any county of the judicial district in which it is committed, is valid when not prohibited by some provision of the state or national constitution. (p. 783.)

RAPE—Allegations of Venue.—An indictment for rape may properly allege that it is presented by the grand jury of the county wherein the prosecution is instituted, and that the crime was committed in another county, naming it. (p. 784.)

RAPE—Indictment—Judicial Knowledge.—It is not essential to an indictment for rape brought in a county other than the one in which the crime was committed that it allege that the county of the prosecution is in the same judicial district as that in which the crime was committed, as the court will take judicial knowledge of that fact. (p. 784.)

R. A. John, assistant attorney general, for the state.

219 HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at death; hence this appeal.

Appellant made a motion to quash the indictment, which was overruled by the court, and he reserved his bill of exception. The indictment was in the usual form, charging that appellant committed the rape, in the county of Colorado, on one Rosa Macha, by force and without her consent. The same was presented by a grand jury of Guadalupe county, and the question raised is as to the authority of the legislature to enact the act of June 18, 1897 (see Acts Spec. Sess. p. 16), with reference to fixing the venue in certain counties in cases of rape. We quote from that portion of the act as follows: "Prosecutions for rape may be commenced and carried on in the county in which the offense is committed, or in any county of the judicial district in which the offense is committed, or in any county of the judicial district the judge of which resides nearest the county seat of the county in which the offense is committed. When the judicial district comprises only one county, prosecutions may

be commenced and carried on in that county, if the offense be committed there, or in any adjoining county." Appellant's motion calls in question the validity of said act of the legislature, as being in contravention of the constitution of the United States, and cites article 6 of the amendments to the federal constitution as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public ²²⁰ trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc. He also urges that said act of the legislature is in violation of section 45 of article 3 of the constitution of the state of Texas. We quote that portion thereof as follows: "The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law, and the legislature shall pass laws for that purpose." And also section 56, which provides: "The legislature shall not, except as otherwise provided in this constitution, pass any local or special law, authorizing . . . changing the venue in civil or criminal cases." He further insists that the indictment is defective, in that it fails to show that the place where the offense was committed was within the jurisdiction of the court in which the indictment was presented, in that it appears from said indictment that the offense was committed in the county of Colorado, and beyond the limits of Guadalupe county, and it also appears from said indictment that it was returned into the district court of Guadalupe county, by a grand jury of said Guadalupe county, the same not being the county in which the offense is alleged to have been committed. The able counsel who represented appellant in the court below by appointment does not appear to have followed the case with a brief into this court, which is much to be regretted, inasmuch as the questions presented in the motion in the court below are important, and the assistant attorney general has presented the state's side of the motion in a very exhaustive brief.

With reference to the first proposition of the appellant, to the effect that the act of the legislature of the state of Texas authorizing the prosecution of the offense of rape in some county other than the one where the offense was committed, or in some county of the district, is void, because violative of the constitution of the United States, we would say that this is not a new question, the same having long since been settled by judicial decisions, both of the supreme court of the United States and by various state courts, in opposition to the contention of appel-

lant, it being universally held that the article of the constitution cited has reference exclusively to the jurisdiction appertaining to the federal judiciary. We can no better express the view taken on this subject than by quoting from the opinion of Chief Justice Marshall in *Barron v. City of Baltimore*, 7 Pet. 243, as follows: "The constitution was ordained and established by the people of the United States for themselves for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their constitution, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the ²²¹ limitations of power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." The language here used was with reference to the fifth amendment, but it is equally applicable to all of the first eight amendments to the constitution of the United States: *Barron v. City of Baltimore*, 7 Pet. 243; *Twitchell v. Commonwealth*, 7 Wall. 321; *Gut v. State*, 9 Wall. 35; *Eilenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. Rep. 424; *Fox v. Ohio*, 5 How. 434; *Colt v. Eves*, 12 Conn. 243; *State v. Wells*, 46 Iowa, 662. Nor do we find any provision in our state constitution prohibiting the legislature from authorizing a prosecution for an offense committed in this state in some county other than the county where the offense was committed. There is nothing in the sections of our constitution referred to by appellant that would limit the legislature in this matter. Section 45 simply vests power in the courts to change the venue, and section 56 prohibits the legislature from passing any law changing the venue in civil or criminal cases by any local or special law. We do not understand these clauses with reference to giving the legislature authority to pass laws authorizing the courts to change the venue to create a limitation on the legislature with reference to fixing the venue in criminal cases originally. On the contrary, these clauses would appear to apprehend a power in the legislature to fix venue in cases in the first instance. After they are once fixed, the venue can then only be changed through the courts,

by a procedure authorized by the legislature. If we look to other sections of our organic law, we do not find any prohibition or limitation on the legislature in regard to the venue of criminal cases. Section 10, article 1, provides that "in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. . . . And no person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger." Section 15 provides: "The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." Section 19 provides: "No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land. All of these articles are limitations on the power of either the courts or the judiciary. If it could be shown, under section 10, that an indictment by a grand jury meant only a grand jury of the county where the offense was committed, then to deprive a defendant of that right (that is, to authorize him to be indicted by the grand jury in some other county) would not be due course of law. But we seek in vain in the constitution or ²²² elsewhere for such a limitation. In England, where the grand jury system had its birth, a grand jury was drawn from the vicinage where the offense was committed. Indeed, as originally constituted, the jury that tried an offender was composed of the witnesses against him. But if it be conceded that such was the rule at common law, we only have the common law in force here by adoption, and in the absence of statutory enactment, if we have no constitutional inhibition, our statutes must control in this matter as in every other; and there being no constitutional inhibition, as we have seen, the legislative declaration on this subject is the supreme law. Moreover, the question in this state seems to have been settled long since against the contention of appellant: *Ham v. State*, 4 Tex. App. 645; *Cox v. State*, 8 Tex. App. 284. And such seems to be the view entertained by all the authorities, in the absence of some constitutional provision requiring the prosecution to be in the county where the offense was committed, or in some county of the district: 1 Bishop's Criminal Procedure, secs. 381, 382. In our state the legislature has exercised the authority for a number of years

to fix the venue of cases in counties other than the county where the offense was committed: Code of Criminal Procedure, arts. 224-246, inclusive. This authority has been unquestioned in a number of cases. For instance, the offense of forgery, it has been held, may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed: *Mason v. State*, 32 Tex. Cr. Rep. 95, 22 S. W. 144, 408; *Strang v. State*, 32 Tex. Cr. Rep. 228, 22 S. W. 680; *Thulemeyer v. State*, 34 Tex. Cr. Rep. 619, 31 S. W. 659. So, in embezzlement, it has been held that the offense may be prosecuted in the county where the embezzlement took place, or in any county into which the offender may have taken or received the property, or through or into which he may have undertaken to transport it: *Cohen v. State*, 20 Tex. App. 224. So, where property is stolen in one county and carried into another, the prosecution may be commenced in either: *Cox v. State*, 41 Tex. 1; *Connell v. State*, 2 Tex. App. 422; *Cameron v. State*, 9 Tex. App. 332; *Roth v. State*, 10 Tex. App. 27; *Shubert v. State*, 20 Tex. App. 320. And other cases under other statutes might be cited. Furthermore, in our opinion, it was properly alleged in the indictment, which was found and presented by a grand jury of Guadalupe county, that the offense was committed in Colorado county. In *Chivarrio v. State*, 15 Tex. App. 330, this question was decided. That was a case where the offense was committed in Encinal county, which was an unorganized county, and by legislative enactment was attached to Webb county for judicial purposes. There it was held that the place of the offense was improperly laid in Webb county; and that it should have been laid in Encinal county, where it actually occurred. This view was taken because it was not provided that the venue in unorganized counties could be laid, under article 245 of the Code of Criminal Procedure, in the ²²³ county where the prosecution was carried on. That case has a direct application to the case at bar, as the act of the legislature under which this prosecution was begun does not provide that the indictment may allege that the offense was committed in the county where the prosecution was carried on. As to whether Guadalupe county has jurisdiction of this offense, as being in the judicial district in which Colorado county is situated, where the offense was committed—it was not necessary to make this averment in the indictment, as the court will take judicial cognizance that it is within the same judicial district with Colorado county, where the offense was alleged to have

been committed: *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575; 1 Bishop's Criminal Procedure, sec. 383, subd. 2.

Appellant excepted to that portion of the charge of the court which instructed the jury with reference to the defendant's failure to testify. The charge was in accordance with the statute, and was not objectionable. The charge on circumstantial evidence was given in this case, but we presume it was given out of abundant caution, and with the view of extending to appellant all possible benefits of the law to which he might be entitled. In the view we take of it, such a charge, though appellant was not entitled to it, does not suggest a cause of complaint on his part.

We have examined the record carefully, and in our judgment the facts amply sustain the finding of the jury. The defendant was identified by both positive and circumstantial evidence as the perpetrator of the offense. He met his victim on the railroad, as she was returning from Weimer to her home, situated two or three miles from said place; and in order to accomplish his purpose he assaulted and beat her (she being only a sixteen year old girl) into a state of insensibility, then perpetrated the crime, and left her in an unconscious state on the railroad track. Her injuries were of a very serious character, her skull being fractured and her life imperiled. Under the circumstances of this case, we think the jury very properly inflicted the highest penalty known to the law, and the judgment is affirmed.

The Limitations Imposed by the United States Constitution upon the powers of government "are in all cases to be understood as limitations upon the government of the Union only, except where the states are expressly mentioned": Cooley's Constitutional Limitations, 19. Article 8 of the federal constitution, relating to cruel or unusual punishments, does not apply to the states: *McDonald v. Commonwealth*, 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874; *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322; nor does the fifth amendment, providing that no person shall be compelled to be a witness against himself in any criminal case: *St. Joseph v. Levin*, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101; nor does the fourth amendment, relating to searches and seizures: *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021. And the provision of section 2 of article 3, declaring that the trial of crimes shall be held in the state where they shall have been committed, and of the sixth amendment guaranteeing that in all criminal prosecutions the accused shall enjoy the right to trial by an impartial jury of the state and district wherein the crimes shall have been committed, apply only to proceedings in the courts of the United States for offenses against the United States: *Ex parte McNeeley*, 36 W. Va. 84, 32 Am. St. Rep. 831, 14 S. E. 436.

RAINEY v. STATE.

[41 Tex. Cr. Rep. 254, 53 S. W. 882.]

CONSTITUTIONAL LAW—Occupation Taxes.—A statute imposing an occupation tax upon cotton, wool, or hide buyers, but exempting from its operation merchants who pay a different occupation tax, is unconstitutional and void, as not being equal and uniform taxation. (p. 786.)

J. R. Kennedy, for the appellant.

R. A. John, assistant attorney general, for the state.

255 HENDERSON, J. Appellant was convicted of pursuing an occupation taxed by law without having first procured a license, and his punishment assessed at a fine of twenty dollars, and he appeals.

The only question presented that requires consideration is the constitutionality of the tax levied, under which appellant was convicted. The conviction here was under subdivision 38 of the act of the special session of the twenty-fifth legislature: See page 54. Said subdivision reads as follows: "From every cotton buyer, or buyer of wool or hides, ten dollars; provided, that a merchant who pays an occupation tax as herein prescribed shall not be considered a cotton buyer, or buyer of wool or hides." The contention here is that the exemption of merchants from the operation of the tax is in violation of certain provisions of our constitution, to wit, sections 1 and 2 of article 8 of the constitution, and section 3 of our Bill of Rights. We think the contention of appellant is correct. For a full discussion of the question, see *Ex parte Jones*, 38 Tex. Cr. Rep. 482, 34 S. W. 513; followed by *Ex parte Overstreet*, 39 Tex. Cr. Rep. 474, 46 S. W. 825. By reference to subdivision 1 of the occupation tax act of 1897, it will be seen that the tax for pursuing the occupation of merchant may be as low as three dollars. It would therefore follow that such a merchant, on payment of three dollars, could pursue the same occupation that a cotton buyer was authorized to follow, but the cotton buyer would be required to pay a tax of ten dollars. This certainly would not be uniform and equal taxation: *Pullman Palace Car Co. v. State*, 64 Tex. 279, 53 Am. Rep. 758. Because the statute under which this conviction was had is unconstitutional, the judgment is reversed, and the prosecution ordered dismissed.

A Statute Exacting Licenses from peddlers and hawkers, but exempting therefrom and from payment of the license fee every resident of the town having a place of business therein, owning and paying taxes to the amount of twenty-five dollars on his stock in trade, is unconstitutional: *State v. Mitchell*, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481, and see the cases cited in the cross-reference note thereto.

FORD v. STATE.

[41 Tex. Cr. Rep. 270, 53 S. W. 846.]

RAPE.—Assault with Intent to Commit rape can be shown only by evidence of force or attempted force, and not by evidence of fraud alone. (p. 788.)

RAPE—Assault to Commit—Evidence.—Under an indictment for an assault with intent to rape, conviction cannot be had upon evidence showing an attempt to rape by fraud alone. (p. 788.)

J. Grothgar, for the appellant.

R. A. John, assistant attorney general, for the state.

270 DAVIDSON, P. J. Appellant was convicted of assault with intent to commit rape upon Mamie Boyd without her consent, and by means of force, threats, and fraud, and his punishment assessed at twenty years' confinement in the penitentiary.

The evidence discloses that the transaction occurred at night; that appellant secured entrance into the house through an open window, which was eight or ten feet above the ground, by placing a ladder against it. It appears he entered the adjoining room to that occupied by the prosecutrix, and finally found his way into her room. She testified that the window had been raised for the purpose of ventilation. She awoke with some difficulty, and discovered the odor of chloroform, the room being filled with it. When she was finally sufficiently aroused from her stupor to understand the situation, her nightdress had been pulled up about her chin, leaving her body bare. Appellant was kneeling by the side of the bed, with his hand upon her private parts. She immediately screamed and seized appellant. A struggle ensued. He finally, after beating her with his fists, secured release, and escaped through the window. The court instructed the jury that "if defendant, by placing his head upon the ²⁷¹ person of prosecutrix, with intent to have carnal knowledge of her, and penetrate her female organ with his, without her consent, and that he intended to use such force

to accomplish that purpose as might reasonably be supposed sufficient to overcome any such resistance upon her part as she might make, taking into consideration the relative strength of the parties, and other circumstances of the case, he would be guilty of an assault to rape, as charged in the indictment." This is the only issue upon which the case was submitted to the jury. Under the allegations in the indictment, the facts in the case did not justify the charge given. Appellant was not guilty of an assault with intent to rape: *Milton v. State*, 23 Tex. App. 204, 4 S. W. 574. An assault with intent to commit rape can only be shown by evidence of force or attempted force, and not by fraud. It is not necessary here to discuss the question of threats. In Milton's case, as in this, the prosecutrix was touched by the accused, and chloroform used. It was there held that the facts did not show an assault with intent to commit rape, but only an attempt by means of fraud. "It is not competent," as was said in that case, "to indict for an assault with intent to rape, and convict upon evidence establishing an attempt to rape by fraud." That this is a case of attempt to rape by fraud is made certain by reference to the statute. Article 636 of the Penal Code reads as follows: "The fraud must consist in the use of stratagem by which the woman is induced to believe the offender is her husband, or in administering, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance. It is a presumption of law, which cannot be rebutted by testimony, that no consent was given under the circumstances mentioned in this article": Pen. Code, arts. 636, 640. Now, where the party attempting the rape uses some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, he would be guilty of rape, provided he had sexual intercourse with the female while she was under the influence of such substance; and, using such means, but failing in the ultimate design, he would be guilty of an attempt to commit rape by fraud. The question of force did not enter into this case, although he did place his hands and lay his head on another portion of her body; for, if the touching of the prosecutrix by appellant with some portion of his body eliminated the question of fraud, and brought it within the rule of an assault by force, then it would be impossible to have a rape by fraud. We are not, of course, to be understood as saying that, although the party failed in his pur-

pose to have intercourse by means of fraud, and, having abandoned that purpose, by force overcame all resistance, and thus perpetrated rape, he would not be guilty of a rape by force. But that question is not here involved. A party may fail in his stratagems or purposes to have the intercourse by means of fraud, and subsequently ²⁷² undertake or even carry out his purpose by means of force and threats. But, as before stated, the evidence does not suggest any such question. If the testimony of the state is true, the indictment does not present a case that would justify a conviction by force. The judgment is reversed and the cause remanded.

The Crime of Rape is the subject of a monographic note to Smith v. State, 80 Am. Dec. 361-375. A reference to page 366 of this note will show that intercourse with a woman procured by misrepresentation is not rape, if she consents to it. But see *Payne v. State*, 40 Tex. Cr. Rep. 202, 76 Am. St. Rep. 712, 49 S. W. 604. Actual violence, or touching the person of the one assaulted, is held not essential to the crime of assault to commit rape: *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344, 16 S. W. 286; *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25, 18 S. E. 132. See, also, *People v. Verdegreen*, 106 Cal. 211, 46 Am. St. Rep. 234, 39 Pac. 607.

HUDSON v. STATE.

[41 Tex. Cr. Rep. 453, 55 S. W. 492.]

WITNESSES—Impeachment.—If reputation for chastity has a direct bearing upon the probability of the facts stated by the witness it may be proved for the purpose of impeachment. (p. 790.)

WITNESSES—Impeachment.—A witness cannot be impeached by evidence that he is in the habit of associating with lewd and unchaste women. (p. 790.)

WITNESSES—Impeachment.—A defendant charged with burglary, and being examined as a witness, cannot be impeached by evidence that he has associated with lewd women. The question of his chastity has no bearing upon his veracity in such case. (p. 790.)

WITNESSES—Impeachment of Defendant.—If an accused has been examined as a witness, he may be impeached by showing that he has been theretofore charged with an offense involving legal or moral turpitude. The same rules apply to an accused as to any other witness sought to be impeached. (p. 790.)

R. A. John, assistant attorney general, for the state.

453 DAVIDSON, P. J. Appellant was convicted of burglary, and his punishment assessed at four years confinement in the penitentiary, and he appeals.

During the trial the state's counsel cross-examined defendant while upon the witness-stand, asked him "how long he was down in the south end, and defendant told him, 'Four or five days.' Counsel for state asked said defendant if while down there he did not meet lewd and unchaste women, and if he did not sleep with them while he was there, to which last question counsel for defendant objected for several reasons—among others, that it was illegal, attacking the conduct and character of defendant, and had a tendency to disgrace him in the eyes of the jury, etc. The court overruled the objections, and required defendant to answer, which he did in the affirmative." Appellant's counsel thereafter moved the court to exclude the testimony. This was also overruled. As a general rule, particular traits of character, aside from that of habitual lying, etc., shall not be made the subject of inquiry for the purpose of impeachment. In a case where reputation for chastity has a direct bearing upon the probability of the facts stated by the witness, it may be proved for the purpose of impeachment. Thus, in prosecutions for rape, or assault with intent to commit that offense, defendant may prove the unchaste character of the ⁴⁵⁴ prosecutrix, as tending to show the improbability of her story. Thus, it would seem, a witness cannot be impeached by evidence that he is in the habit of associating with lewd and unchaste women: 29 Am. & Eng. Ency. of Law, 805, note 3; Cline v. State, 51 Ark. 140, 10 S. W. 225. It was held in Holsey v. State, 24 Tex. App. 35, 5 S. W. 523, that the character of defendant's associates could not be made the subject of inquiry. Appellant was here charged with burglary, and the fact that he may have slept with lewd women could not tend to impeach his veracity. As I understand the rule, as far as we have gone in this respect is to hold that, where defendant is being examined, he may be impeached by showing that he was charged with an offense showing legal or moral turpitude; and the same rule, as a general proposition, would apply to defendant as any other witness sought to be impeached. A man may be truthful, and yet associate at times with unchaste women. This question of chastity had no bearing upon appellant's veracity. He had not placed this phase of his character in issue, and the state had no authority to do so. There are other questions suggested for our consideration, but, as we view them, they are without merit. For the error discussed, the judgment is reversed and the cause remanded.

The Character of a Witness cannot be impeached by proof of particular acts of immorality. In many jurisdictions, however, the general moral character of a witness may be inquired into, but

numerous authorities limit the inquiry to his character for truth and veracity: See the monographic note to *Lodge v. State*, 82 Am. St. Rep. 26-31. Want of chastity in a witness cannot be investigated for the purpose of impeachment, except in rape cases. There is authority, however, to the contrary: See *Kolb v. Union R. R. Co.*, 23 R. I. 73, 91 Am. St. Rep. 614, 49 Atl. 392; monographic note to *State v. Sibley*, 53 Am. St. Rep. 479-482; *State v. Tuttle*, 67 Ohio St. 440, 93 Am. St. Rep. 689, 66 N. E. 524; *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022. As to the right to attack the credibility of a witness because he has been charged with a crime involving legal or moral turpitude, see the monographic note to *Lodge v. State*, 82 Am. St. Rep. 38, 39. If the accused takes the stand in his own behalf, he may, in general, be treated like any other witness: See the monographic note to *State v. Duncan*, 38 Am. St. Rep. 895.

BATCHELOR v. STATE.

[41 Tex. Cr. Rep. 501, 55 S. W. 491.]

RAPE—Separate Acts of Intercourse—Election.—If on a trial for rape, several distinct acts of intercourse are proved, the prosecution must elect upon which it will rely for a conviction. Rape is not a continuous offense, and each act of intercourse may constitute a distinct crime. (p. 791.)

R. A. John, assistant attorney general, for the state.

503 DAVIDSON, P. J. Appellant was convicted of rape upon Laura Batchelor, a female, being then and there under the age of fifteen years, and not his wife, and his punishment assessed at confinement in the penitentiary for a term of ninety-nine years. The testimony shows several acts of intercourse between the parties in Hood county, besides some prior acts in another county. When the testimony was all in, appellant moved the court to require the state to elect upon which act of intercourse it would rely for a conviction. This was overruled. This was erroneous. It is true, the court confined the jury in their deliberations to the acts in Hood county, but as stated, there were several of these occurring within the twelve months. Rape is not a continuous offense. Each act of intercourse constitutes a distinct offense. The question involved was thoroughly discussed in *Lunn v. State*, 44 Tex. 85, and was previously decided in *Fisher v. State*, 33 Tex. 792. The doctrine announced in these cases has been followed in this state without a variant opinion. Upon another trial it would be better for the court to limit the effect of those acts not relied upon for con-

viction. For the error indicated, the judgment is reversed and the cause remanded.

The Crime of Rape is the subject of a monographic note to *Smith v. State*, 80 Am. Dec. 361-375.

The Joinder in an Indictment of several felonies of the same or similar nature and the election between them by the prosecution, are considered in the monographic notes to *State v. Bell*, 92 Am. Dec. 660-666; *Ben v. State*, 58 Am. Dec. 238-250.

KING v. STATE.

[42 Tex. Cr. Rep. 108, 57 S. W. 840.]

CRIMINAL LAW.—Admission of Irrelevant or Inadmissible Evidence does not require a reversal of a judgment of conviction unless its effect upon the defendant's case was probably injurious, and if he is given the minimum punishment after his guilt is shown beyond question, the admission of such evidence cannot have had an injurious effect upon him. (p. 793.)

FORGERY of Unstamped Instrument.—It is not necessary to conviction of forgery that the forged instrument be stamped with a revenue stamp. (p. 793.)

FORGERY—Subjects of.—If an instrument is void on its face, it cannot be the subject of forgery; but if it is valid on its face, though invalid in fact, or under the proof, it may be the subject of forgery. (p. 794.)

FORGERY—Subject of—Married Woman's Note.—A married woman's note is not the subject of forgery if the fact that she is married appears from the face of the note, but if such fact does not appear therefrom, and proof of extrinsic facts are necessary to establish it, the note is the subject of forgery. (p. 795.)

Parker & Maben, for the appellant.

R. A. John, assistant attorney general, for the state.

¹⁰⁸ **DAVIDSON, P. J.** Appellant was convicted for forgery, and his punishment assessed at confinement in the penitentiary for a term of two years.

The state was permitted to prove by Mrs. Huffmaster that Chestnutt, appellant's principal made a new contract in regard to the piano subsequent ¹⁰⁹ to the alleged forgery, by virtue of which contract Mrs. Huffmaster and her husband executed new notes for the purchase price of said piano. Defendant was not present when the new contract was signed. Objections were urged on the ground that he was not present, and that this settlement

was an indirect method of getting before the jury the opinion of Chestnutt and Mrs. Huffmaster that the note declared upon was a forgery. We believe that this testimony was not admissible, but further believe that it is not of such prejudicial character as to require a reversal. It is an undisputed fact, under the testimony, that the note declared upon was a forgery. Mrs. Huffmaster testified, as did her son, that it was a forged instrument. Defendant offered no testimony. Before executing the new contract, Chestnutt and Mrs. Huffmaster visited appellant in jail, taking with them the forged note. The result of this visit is not stated, but the new contract was then made, Mrs. Huffmaster retaining the piano. The admission of irrelevant or inadmissible testimony will not require a reversal unless its effect upon the defendant's case was probably injurious. The jury gave appellant the minimum punishment, and his guilt is placed beyond question. If the punishment allotted had been above the minimum, this error would have required a reversal, for in that event its operation might have been prejudicial.

The court charged the jury as follows: "If you believe from the evidence, beyond a reasonable doubt, that D. L. King, defendant, in Tarrant county, Texas, on or about the 6th of January, 1899, without consent or lawful authority of Mrs. M. I. Huffmaster, and with intent to injure or defraud, did make and sign the note or instrument in writing alleged and set out in the indictment read to you in this case, then notwithstanding the fact that Mrs. M. I. Huffmaster at said time was a married woman, and notwithstanding the further fact that said instrument in writing was not stamped with a United States revenue stamp, you will find defendant guilty as charged." The objections urged are (1) that the evidence showed that Mrs. Huffmaster was a married woman, and on such proof it was the duty of the court to instruct an acquittal; and (2) the instrument, not having been properly stamped, was not the subject of forgery. It is not necessary, in case of forgery, that the forged instrument be stamped: See *Thomas v. State*, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242. Nor was there error in instructing the jury that the instrument would be a forgery, notwithstanding Mrs. Huffmaster was a married woman. It is a fact beyond question that Mrs. Huffmaster was a married woman. This contention of appellant is based upon the theory that the act of a married woman in signing a note without the concurring signature of her husband is invalid and nonenforceable in law. Mr. Bishop, in his work on Criminal Law, says:

"Sec. 533. The false instrument must be such as, if true, would be of some real or legal efficacy, since otherwise it has no tendency to defraud. In other words, it must either be in fact, or must appear to be, of legal validity, but it need not have both the appearance and ¹¹⁰ the reality." In support of this proposition he cites many authorities collated in note 5 under above section. In section 538 he says: "A writing affirmatively invalid on its face cannot be the subject of forgery, because it has no legal tendency to effect the fraud. Entering into this question is the distinction many times adverted to in these volumes, that every man is presumed to know the law, yet not to know the facts." So it will be seen that the distinction is clearly drawn between knowledge of law and knowledge of fact. If the instrument is void on its face, it cannot be the subject of forgery, but if valid on its face, though invalid as a matter of fact or under the proof, it would still be the subject of forgery. In section 541 the same author says: "Since men are not legally presumed to know facts a false instrument good on its face, may work a fraud, though extrinsic facts show it to be invalid even if it were genuine. Therefore there may be forgery of such an invalid instrument." In *People v. Galloway*, 17 Wend. 540, 542, this language is found: "There is a distinction between the case of an instrument apparently void and one where the validity is to be made out by the proof of some extrinsic fact. In the former case the party who makes the instrument cannot, in general, be convicted of forgery, but in the latter he may." So with a fictitious person. "From this doctrine of a seeming validity sufficing, though it is not real, we have the further result that if the person whose instrument the forgery purports to be is dead, or if he is a mere fictitious person, still, as the question of the existence of such a person is one of fact, not of law, and the instrument appears valid on its face, the offense is complete": Bishop's Criminal Law, sec. 543. In section 544: "1. Restated, the ordinary doctrine is that, for the invalidity of the instrument to be a perfect defense, the defect must appear on its face, or, to exclude this sort of defense, it must appear on its face to be good and valid for the purpose for which it was created. In another aspect: 2. Evidence of fact. The instrument must be such that if it were genuine it would be evidence of the fact it sets out." We are not undertaking here to discuss instruments or writings uncertain on their face. So it has been held that, if there is a bare possibility that another may be imposed upon, a conviction will be sustained: *State v.*

Dennett, 19 La. Ann. 395; State v. Gryder, 44 La. Ann. 962, 32 Am. St. Rep. 358, 11 South. 573. "It is immaterial whether the counterfeited instrument be such as, if real, would be effectual to the purpose it intends. If there is only a resemblance sufficient to impose upon those to whom it is uttered, or to the public generally, it is sufficient": 3 Chitty on Criminal Law, 1035, 1039. "It is not necessary to the offense the instrument should be one which, if genuine, would be a binding obligation. It is sufficient that the instrument purports to be good. The want of validity must appear on the face of the paper, to relieve from the character of forgery": 13 Am. & Eng. Ency. of Law, 2d ed., 1088; United States v. Turner, 7 Pet. 132. In the same volume (13 American and English Encyclopedia of Law) we find this language: "As ¹¹¹ a general rule, any writing in such form as to be the means of defrauding another may be the subject of forgery, or alterations in the nature of forgery": Page 1093, note 3, for collation of numerous authorities. "The writing need not be such as, if genuine, would be legally valid. If it is calculated to deceive, and intended to be used for a fraudulent purpose, this is enough": Notes 4 and 5, for authorities. "An instrument valid on its face is equally the subject of felonious forgery or felonious uttering, though collateral or extrinsic facts, of whatever character, may exist, that would render it absolutely void if genuine": Same authority, note 6, for authorities; People v. Rathbun, 21 Wend. 509; People v. Galloway, 17 Wend. 540; Russell on Crimes, 317-328; State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158; State v. Hilton, 35 Kan. 338, 11 Pac. 164; State v. Pierce, 8 Iowa, 231. To the same effect is Anderson v. State, 20 Tex. Cr. App. 595; and it follows the rule laid down by Mr. Bishop, *supra*. In view of these authorities, it will hardly be necessary to discuss the question further. If they are correct, this instrument is clearly the subject of forgery. The note does not show on its face to have been the act of a married woman. There is nothing to indicate that fact, and, in order to show she was a married woman, extrinsic facts were necessary. If the note, on its face, had shown her to be a married woman, we would have a different question, because in that event the instrument itself would have given notice of its invalidity. Caffey v. State, 36 Tex. Cr. Rep. 198, 61 Am. St. Rep. 841, 36 S. W. 82, is hereby overruled.

There was no error in refusing a continuance. If, in fact, Mrs. Huffmaster told Mrs. Crosby, or John McClain, or Mrs.

Payne that she paid more for the piano than was in fact agreed to be paid, it would make no difference. She admitted making statements to the effect that the piano was a four hundred dollar piano, or perhaps cost four hundred dollars, when in fact she only paid two hundred and seventy-five dollars. But how this could affect the forgery of this note is by no means clear. If she had agreed to pay four hundred dollars, or so stated, it would have been no excuse for the forgery, and no evidence of the fact, under this case, that the instrument was not forged. There is no contradiction of the forgery. As presented, there is no such error in the record as requires a reversal of the judgment, and it is affirmed.

Mr. Justice Henderson dissented, and said in part that "the instrument in question, as shown by the evidence, was the act of a married woman, and did not show on its face that it was for necessities or for the benefit of her separate property, and was not signed by her husband jointly with her. But it is said that, because this was not shown on the face of the note, extrinsic proof could not be resorted to in order to establish the invalidity of the note. I quote from the opinion as follows: 'The note does not show on its face to have been the act of a married woman. There is nothing to indicate that fact, and, in order to show she was a married woman, extrinsic facts were necessary. If the note on its face had shown her to be a married woman, we would have a different question, because in that event the instrument itself would have given notice of its invalidity.' That is, as I understand it, it is conceded in the majority opinion that the note of a married woman does not create a pecuniary obligation, but, because the note does not show on its face that she was a married woman, that this cannot be shown by extrinsic evidence, in defense of the prosecution. I cannot yield my assent to such a doctrine. This would be tantamount to saying to appellant, 'the instrument is worthless, and it could be shown in a civil suit, but you will not be permitted to do so against a criminal accusation.' While there was nothing on the face of the note to show that Mrs. M. I. Huffmaster was a married woman, still any person receiving said note was bound to take notice of the status of Mrs. Huffmaster, to wit, that she was a married woman, and the extent to which she could bind herself. In my opinion, the indictment, on its face, set out an instrument which apparently purported to be the obligation of M. I. Huffmaster. It was competent for appellant to show that she was a married woman, and when this was established the instrument created no valid and binding obligation, and, if it had been her genuine act, it was not the subject of legal liability; and the court instead of giving the charge it did, should have directed an acquittal."

The Crime of Forgery is the subject of a monographic note to *Arnold v. Cost*, 22 Am. Dec. 306-321. Ordinarily, an instrument void on its face cannot be the subject of forgery: *Caffey v. State*, 36 Tex. Cr. Rep. 198, 61 Am. St. Rep. 841, 36 S. W. 82; *State v. Evans*, 15 Mont. 539, 48 Am. St. Rep. 701, 39 Pac. 850; *State v. Dunn*, 23 Or. 562, 37 Am. St. Rep. 704, 32 Pac. 621; note to *Hendricks v. State*, 8 Am. St. Rep. 469. But it need not have actual legal efficacy; it is sufficient that, if genuine, it might have such efficacy. Although its invalidity might be established by extrinsic evidence, it may be the subject of forgery: *State v. Johnson*, 26 Iowa, 407, 96 Am. Dec. 158. An unstamped writing may be the subject of forgery: *Thomas v. State*, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242; *State v. Peterson*, 129 N. C. 556, 85 Am. St. Rep. 756, 40 S. E. 9; monographic note to *Garland v. Gaines*, 84 Am. St. Rep. 197-199. So may a note appearing on its face to be barred by the statute of limitations: *State v. Dunn*, 23 Or. 562, 37 Am. St. Rep. 704, 32 Pac. 621; or a contract against public policy: *People v. Munroe*, 100 Cal. 664, 38 Am. St. Rep. 323, 35 Pac. 326; or a mortgage of a homestead purporting to be executed by the husband alone: *People v. Baker*, 100 Cal. 188, 38 Am. St. Rep. 276, 34 Pac. 649. But the deed of a homestead, which is also the separate property of the wife, if it does not show affirmatively her privy examination and acknowledgment, has been held not the subject of forgery: *Johnson v. State*, 40 Tex. Cr. Rep. 605, 76 Am. St. Rep. 742, 51 S. W. 382. See, too, the note to *Arnold v. Cost*, 22 Am. Dec. 316.

HONEYCUTT v. STATE.

[42 Tex. Cr. Rep. 129, 57 S. W. 806.]

MURDER—Declarations of One Accused of Murder concerning the difficulty made five or ten minutes thereafter and within one hundred yards of the scene thereof, are admissible as part of the *res gestae*. (p. 798.)

MURDER—Second Degree—Malice.—If a person makes an assault upon another with either express or implied malice, with intent to kill, and, during the difficulty, is forced to kill a third person in defense of his life, the killing can be of no higher grade than murder in the second degree. (p. 799.)

MURDER—Degrees—Malice—Proof.—In order to constitute murder in the first degree, express malice must be affirmatively shown as against the person killed. (p. 799.)

MURDER IN SECOND DEGREE.—If an accused assaults one person under circumstances which would make a killing murder, and another person, not intended to be killed, is killed, either by accident or design, the killing is murder in the second degree, upon implied malice. (p. 799.)

HOMICIDE—Manslaughter.—If one person assaults another with no intention to kill and subsequently kills a third person in resisting an attack upon him by the latter with a deadly weapon, the killing is of no higher grade than manslaughter. (p. 800.)

I. O. B. Richardson and E. B. Wheeler, for the appellant.

R. A. John, assistant attorney general, for the state.

¹³⁰ DAVIDSON, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

Cooper, a witness for the state, testified: That he was at home, about one hundred yards from the scene of the homicide, about 8 o'clock at night, when he heard the cries of women at appellant's residence. That he started in that direction, and met some of the children about halfway, and returned with them to his house. While returning he saw defendant, alone, entering his yard. That, at the muzzle of his Winchester rifle, he forced appellant to retire outside the yard, and said to him, "Now, if you have anything to say to me, say it there." Up to this time nothing had been said by either of them. This occurred about five or ten minutes after he had first heard the outcry. Josephine Honeycutt had testified in behalf of the state that she and her brothers and sisters had defendant down on the floor at the time of the outcry, and during the difficulty, before letting him up; that, as soon as they let him up, he at once went in the direction of Cooper's residence. Appellant then proposed to prove his statement to Cooper "that his [defendant's] family had tried to kill him that night, and that he had done what he did in self-defense, and to keep his family from killing him, and that he feared he had killed his daughter Rosa, and requested witness to go back to his house with him, and that he then and there ¹³¹ went back with him." Exceptions were reserved to the rejection of this testimony. This was admissible as *res gestae*.

We do not purpose reviewing the various criticisms of the charge. Two theories were sharply presented under the evidence. For the state it is contended: That defendant armed himself with an ax and a knife of a deadly character, and entered the room where his family were congregated after supper. That as he entered he shut and "thumb-latched" the door. On entering he placed the ax by the side of the door, and took his seat on the opposite side of the room, near his wife, in front of the fireplace, and immediately by the side of his little daughter, and began a conversation, which finally became unpleasant and caustic, in regard to an absent son, whose picture was hanging on the wall, over the fireplace. His wife stated that, if the picture annoyed him, she would remove it, whereupon he arose and advanced upon her with the drawn knife, evidently for the purpose of assaulting her. While advancing he fell over a

rocking-chair, and his children at once laid hold of him, and held him on the floor. Just how the ax got into the difficulty is not explained by the evidence. Still, it was there, and was used by deceased—his oldest daughter. During the altercation appellant was struck two or three times with the ax, evidently by deceased. He finally stabbed her, causing her death. During the trouble the wife left the room, and when deceased was stabbed all of the children fled to Cooper's residence, defendant also going in that direction. His theory was that when he entered the room he thumb-latched the door because it would not otherwise remain closed; that he had no recollection of carrying the ax into the room, and knows positively that he did not remove it from beside the door; that while sitting in the chair, and during the conversation, he was struck a very severe blow upon the head, followed immediately by a second lick, which felled him to the floor, that the children immediately seized him, his deceased daughter using the ax; and that in defense of himself against this attack he stabbed the deceased. It is an undisputed fact that there were two wounds on the head, and a very severe incisive cut between the collar bone and neck, some two or three inches in depth. One of the licks chipped off a portion of the skull bone. As we understand this evidence, there was no assault upon deceased until after the blows had been inflicted upon appellant by the ax, and after the children had seized him. His evident intention was to assault his wife, and not the daughter, and the assault upon her was made for the purpose of freeing himself from their attack. In this state of case, if he had intended to kill his wife, with either express or implied malice, but during the difficulty was forced to kill his daughter in defense of his life, the killing would have been of no higher grade than murder in the second degree. In other words, in order to constitute murder in the first degree, express malice must be shown as against the girl. Express malice is an affirmative fact, and must be proved. Many illustrations are given in the books of this character of case; and the rule seems to be, without exception, ¹³² in this state, that where an accused assaults one person under circumstances which would make a killing murder, and another party, not intended to be killed, is killed, either by accident or design, this would be murder in the second degree—that is, upon implied and not express malice: *McCoy v. State*, 25 Tex. 333; *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795; *Halbert v. State*, 3 Tex. App. 656; *Taylor v. State*, 3 Tex. App. 387; *McConnel v. State*, 13 Tex. App. 390;

Clark v. State, 19 Tex. App. 498; Musick v. State, 21 Tex. App. 69; Leggett v. State, 21 Tex. App. 382; McConnell v. State, 22 Tex. App. 354, 58 Am. Rep. 648, 3 S. W. 699; Bredlove v. State, 26 Tex. App. 445, 9 S. W. 767; Richards v. State, 35 Tex. Cr. Rep. 38, 30 S. W. 805. These cases are decided upon the theory that express malice is an affirmative fact, and must be affirmatively shown, and unless this has been done the killing could not be murder in the first degree, but would be upon implied malice, and therefore murder in the second degree. In other words, under such state of case the malice would be but an inference. This idea also underlies the theory of imperfect self-defense: Reed v. State, 11 Tex. App. 509, 40 Am. Rep. 795; McCoy v. State, 25 Tex. 333.

Applying these rules to this case: If appellant made a malicious assault upon his wife with intent to take her life, it would be an assault with intent to murder, and if a killing had occurred, it would have been either in the first or second degree; and being foiled in this by the attack of his children, and he killed deceased in resistance of such attack, he would be guilty of no higher offense than murder in the second degree. In this connection the court charged the jury in substance: If the assault was made upon the wife with intent to murder her, and with intent to murder his daughter, he would be guilty of murder in the first degree. Of course, if he assaulted the daughter with intent to kill her upon his express malice, he would be guilty of murder in the first degree whether he made an assault upon his wife or not. But we do not believe this portion of the charge was authorized by the evidence, and that it was injurious is rendered certain by the fact that a verdict of murder in the first degree was obtained inflicting the death penalty. Of course, if he assaulted his wife with no intention of killing her, but only to inflict upon her violence and subsequently killed his daughter in resisting her attack with the ax, his offense would be of no higher grade than manslaughter. For the errors indicated the judgment is reversed and cause remanded.

If One Person Assaults another, and while engaged therein kills a third person who interferes in the proper defense of the party assaulted, he is guilty of the same degree of homicide as though he had killed the party attacked: See the monographic note to Johnson v. State, 90 Am. St. Rep. 577.

To Make Declarations a Part of the Res Gestae, they must be contemporaneous with the main fact, but they need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are regarded as con-

temporaneous: *Elder v. State*, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220, and cases cited in the cross-reference note thereto; *Campbell v. State*, 133 Ala. 81, 91 Am. St. Rep. 17, 31 South. 802; *Hannabalsen v. Sessions*, 116 Iowa, 457, 93 Am. St. Rep. 250, 90 N. W. 93. Declarations made a few minutes or a short time after the occurrence of the principal fact may be admissible: See the monographic note to *People v. Vernon*, 95 Am. Dec. 59. Time is not necessarily a controlling element in the matter of *res gestae*: *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715; *Chapman v. State*, 43 Tex. Cr. Rep. 328, post, p. 874, 65 S. W. 1098.

BARNES v. STATE.

[42 Tex. Cr. Rep. 297, 59 S. W. 882.]

INDICTMENT—Date of Crime.—The failure of an indictment to set out the particular date upon which the crime alleged was committed renders it fatally defective. (p. 801.)

INDICTMENT—Date of Crime.—An indictment, although it sufficiently alleges that the accused did commit the crime charged, is fatally defective if it fails to set out some particular date when the crime was committed. (p. 801.)

Brewer & Windham, for the appellant.

R. A. John, assistant attorney general, for the state.

297 DAVIDSON, P. J. Omitting formal portions, the indictment reads as follows: "Will Barnes, on or about the — day of —, A. D. 1900, and anterior to the presentation of this indictment, in the county of Nacogdoches and state of Texas, did then and there, unlawfully and of his malice aforethought, in and upon W. C. Scott an assault make, with intent to murder the said W. C. Scott, against the peace and dignity of the state." Motion in arrest of judgment was made, (1) upon the failure of the indictment to set out a particular date upon which the offense was committed; and (2) that it failed to allege that appellant did commit the assault. With reference to the last proposition the indictment is sufficient. However, the first ground of the motion is well taken. It is necessary, in charging an offense, to set out some particular date when the offense was committed. Such is the unbroken line of authorities since the case of *State v. Eubanks*, 41 Tex. 291. The judgment is reversed, and the prosecution ordered dismissed.

An Indictment must allege a day certain on which the offense was committed: *Man-zan-man-ne-kah v. United States*, 1 Pinn. 124, 39 Am. Dec. 279; *State v. Beckwith*, 1 Stew. 318, 18 Am. Dec. 46; *Nich-*
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olson v. State, 18 Ala. 529, 54 Am. Dec. 168. But this rule is modified by statute in some jurisdictions. For instance, the Indiana statute provides that no indictment or information shall be quashed or set aside, or proceedings upon it arrested, for omitting to state the time at which the offense was committed, or for stating the time imperfectly, unless time is of the essence of the offense: *Murphy v. State*, 106 Ind. 96, 55 Am. Rep. 722. See, too, *Dill v. People*, 19 Cal. 469, 41 Am. St. Rep. 254, 36 Pac. 229.

McKENNON v. STATE.

[42 Tex. Cr. Rep. 371, 60 S. W. 41.]

CONSTITUTIONAL LAW.—Retroactive Laws which affect the remedy are valid and constitutional, provided they do not interfere with some vested right. (p. 804.)

CONSTITUTIONAL LAW.—Retroactive Laws Enlarging Remedy—Notice of Appeal.—A statute dispensing with the necessity of notice of appeal in justices' courts, and by express terms having a retroactive effect, simply enlarges the remedy without interfering with vested rights, and hence is constitutional and valid. (p. 804.)

W. H. Fears, for the appellant.

D. W. Wilcox & R. A. John, assistant attorney general, for the state.

372 HENDERSON, J. This is an appeal from the county court to this court of a case appealed from the justice court of Ellis county to the county court. The case was dismissed in the county court on the ground that no notice of appeal appeared to have been given in the justice court, and an appeal was prosecuted from the order of dismissal.

It is insisted by appellant that this court should reverse the case because of the enabling act of the twenty-sixth legislature: See Acts 26th Legislature, p. 233. We quote so much of said act as we think necessary to a proper understanding of this case, as follows:

“Section 1. That in appeals from judgments of the justices of the peace and other inferior courts, when the appeal bond provided for in article 889 of the Code of Criminal Procedure of the state of Texas has been filed with the justice or court trying the same, the appeal in such case shall be held to be perfected, and no appeal shall be dismissed on account of the failure of the defendant to give notice of appeal in open court, nor on account of any defect in the transcript.

"Sec. 2. All laws and parts of laws in conflict with the provisions of this act are hereby repealed.

"Sec. 3. The provisions of this act shall apply to all cases now pending in county courts and the court of criminal appeals."

To properly understand this question, it should be stated that appellant was tried and convicted in the justice court on the 18th of July, 1898, and appeal bond was filed on the same day, no notice of appeal being given and entered on the justice docket. On October 5, 1898, upon motion of the state, the case was dismissed in the county court on the ground that no notice of the appeal had been given in the justice court. An appeal was thence prosecuted to this court, and the transcript filed at the Dallas term, March 22, 1899. The act of the twenty-sixth legislature, above quoted, was passed on May 23, 1899, and went into effect ninety days thereafter. So we have presented for our consideration whether or not it was competent for the legislature to pass an act dispensing with a notice of appeal in the justice court, and to make that act relate to cases tried in the lower courts before the passage of the act. It will be noticed in this connection that before the passage of the act in question notice of appeal in the justice court was jurisdictional, and unless this was complied with by appellant, his appeal would be dismissed: *Ball v. State*, 31 Tex. Cr. Rep. 214, 20 S. W. 363; *McDougall v. State*, 32 Tex. Cr. Rep. 174, 22 S. W. 593. Evidently the twenty-sixth legislature, by the act in question, intended to dispense with notice of appeal in the justice court, and intended that this should apply as well to all cases pending on appeal from the justice court, though transpiring before the law took effect, as to those happening afterward. The language of section 3 by its express terms gives the law a retroactive effect. Now, was it competent for the legislature to do this, in the face of section 16 of the Bill of Rights, which, among other things, provides, "No ex post facto or retroactive law shall be made"? An examination of the cases on ³⁷³ this subject shows that it is within the power of the legislature to pass retroactive laws which affect the remedy, provided such laws do not interfere with some vested right. On this subject we quote from Cooley's Constitutional Limitations, page 457, as follows: "If the thing wanting or which failed to be done, and which constitutes the defect in the proceeding, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and, if the regulation consists in doing some

act, or in the mode and manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make same immaterial by a subsequent law." And again (page 469): "The bringing of suit vests in the party no right to a particular decision, because cases must be determined on the law as it stands; not when the suit was brought, but when the judgment was rendered. . . . And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered." The cases which hold the contrary of this doctrine on an examination will be found to have held the act unconstitutional on the ground that the effect was to deprive one of the parties of some vested right. As in *Wright v. Graham*, 42 Ark. 140; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Andrews v. Beane*, 15 R. I. 451, 8 Atl. 540. The latter was a case which involved the validity of an appeal bond. The bond, when taken, it appears, was void, and an enabling statute attempted to give it validity by retroactive effect. The court held that this could not be done. This, however, was a suit between parties, and the point in question involved a vested private right; and we do not believe has any application to the question here. Mr. Kent (1 Kent's Commentaries, 456) says: "A retrospective statute affecting the changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void. But this does not apply to a remedial statute, which may be of a retrospective nature." Tested by this rule we are clearly of the opinion that the legislature was authorized to pass the statute in question, and make it retroactive; and this would apply notwithstanding the case was disposed of in the county court under existing law, which required the notice to be given, inasmuch as the case was still pending in this court, for such is the express provision of the statute in question: *State v. Lambert*, 12 Md. 195. We quote from Chief Justice Marshall in *United States v. The Peggy*, 1 Cranch, 110 (which is also quoted in the Maryland case, *supra*), as follows: "It is, in the general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes, and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional (and of that no doubt in the present case ³⁷⁴ has

been expressed), I know of no court which can contest its obligation. It is true that in mere private cases between individuals a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties; but in great national concerns, where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and, if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such case the court must decide according to existing laws; and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." And in this case we say no vested right is involved. The government, through its legislature, has seen fit to enlarge the remedy—that is, the right of appeal; and, notwithstanding when the case was decided in the county court it was properly decided in accordance with the rule then in force, yet we now have a new rule, which applies to this court and to that case, over which we now have jurisdiction; and, it having been provided that notice of appeal in justice court is not necessary to invest the county court with jurisdiction, and that this shall apply to cases pending in this court, it is our opinion that the county court now has jurisdiction of the case, and the judgment of the lower court is reversed and the cause remanded.

Davidson, P. J., dissents.

Over Mere Remedial Procedure the power of the legislature is absolute, and laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein: *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 85 N. W. 376, 95 Am. St. Rep. 870, and cases cited in the cross-reference note thereto. But a retroactive statute is valid only when it is remedial and does not impair vested rights: *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194, 48 Pac. 613; *Merchants' Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481. A law, even if intended simply to change the remedy or procedure, is void if it impairs vested rights: *Gladney v. Sydnor*, 172 Mo. 318, 95 Am. St. Rep. 577, 72 S. W. 554.

BROWN v. STATE.

[42 Tex. Cr. Rep. 417, 60 S. W. 548.]

OFFICER DE FACTO—Assault upon.—A statute making an assault on an officer engaged in the discharge of his duty an offense refers to and includes officers de facto as well as de jure. (p. 807.)

OFFICERS DE FACTO—What Constitutes.—A person who has received a valid appointment from a sheriff as his deputy and has entered upon the discharge of the duties of such deputy, but has failed to conform to the requirements of the statute of taking the oath of office, or filing his commission for record, is an officer de facto. (p. 808.)

ASSAULT—Intent to Injure.—There must be an intent to injure the person assaulted before the assaulting person can be guilty of an assault, and if the violence used is of slight character, or there is any suggestion that it was unintentional or accidental, it becomes the duty of the court to charge the jury that the violence used must be intent to injure to constitute it an assault. (p. 809.)

Davis & Wilcox and Garnett, Smith & Merritt, for the appellant.

D. E. Simmons, acting assistant attorney general, for the state.

417 HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of twenty-five dollars and prosecutes this appeal.

The indictment charges the assault to have been committed by appellant, on one A. T. Robertson, "an officer, to wit, a deputy sheriff of Collin county, Texas, and then and there in the lawful discharge of the duties of said office, and the said C. E. Brown then and there being informed and knowing that the said A. T. Robertson was then and there an officer discharging an official duty," etc. The facts proven show that A. T. Robertson in January, 1899, received an appointment in writing as deputy sheriff from the sheriff of Collin county, Texas, but it was not shown that the constitutional oath of office was taken by said Robertson, and it was not shown that he complied with article 4896 of the Revised Statutes, with regard to having his appointment recorded in the office of the county clerk. The evidence further tends **418** to show that the alleged assault was committed by appellant on Robertson while said Robertson was arresting one Proffet for a breach of the peace, and while he had said Proffet and appellant in custody, having previously arrested appellant for interfering in the arrest of Proffet.

Appellant contends that subdivision 1, article 601, Penal Code, making an assault on an officer engaged in the discharge of his

duty an offense, refers to officers *de jure*, and not *de facto*; and he objects to the testimony of the state introduced for the purpose of showing that Robertson was a *de facto* officer. He further objected to the charge of the court, which instructed the jury that Robertson was an officer, within the contemplation of the statute, insisting that inasmuch as the testimony did not show he was an officer *de jure*, but at the most only a *de facto* officer, this matter should be left to the jury, under appropriate instructions. We cannot agree to either of these contentions. The cases of *Alford v. State*, 8 Tex. Cr. App. 545, and *Blair v. State*, 26 Tex. Cr. App. 393, 9 S. W. 890, which are relied upon by counsel, do not determine this question in favor of appellant. In *Alford's* case the character claimed by the officer was that of a deputy marshal of Fort Worth, or bailiff of the grand jury. The court say there is no such office as deputy marshal of a city or town, and the temporary office of bailiff of the grand jury expired when the grand jury was previously discharged, so that the claim of White, the deceased in that case, as an officer, to arrest appellant, could not be sustained. He was neither a *de jure* nor a *de facto* officer. Moreover, the decision appears to be based upon the illegality of the warrant. In *Blair's* case, appellant was charged with carrying a pistol, and attempted to justify as an officer. The proof shows that he formerly lived in Val Verde county; that some two years before he had an appointment from the sheriff of Val Verde county as a deputy sheriff or guard; that he was at the time of the alleged offense living in Kinney county, and had been employed seven or eight months prior to his arrest as a clerk in a mercantile establishment in the latter county. There was no claim here that he was ever an officer of Kinney county, either *de jure* or *de facto*, nor that he was in Kinney county in the discharge of any duty as a deputy sheriff of Val Verde county, when he was carrying the pistol. In this case the court say: "Evidently appellant was not a deputy sheriff, and could claim no authority to carry a pistol by virtue of the paper introduced in evidence." As stated, neither of the cases is authority for the contention of appellant in this case. The decisions indicate that, before one can be a *de facto* officer, there must be some office which he could hold *de jure*. However, this is not a new question in this state. In *Weatherford v. State*, 31 Tex. Cr. Rep. 530, 37 Am. St. Rep. 828, 21 S. W. 251, which in its facts is much like the present case, the court, after discussing the authorities, expressly hold that a *de facto* officer was authorized to make an arrest and to

summon a posse to aid him; that while so engaged such officer could not be held to act at his own peril or outside his duties because of a defective or nonrecord of ⁴¹⁹ the officer's right or title to his office. And see *Dane v. State*, 36 Tex. Cr. Rep. 84, 35 S. W. 661. The court, as stated above, instructed the jury that Robertson was an officer. Evidently he was not an officer de jure, because he was not shown to have taken the oath of office, and had not recorded his commission as deputy sheriff. Was he a de facto officer? A de facto officer has been defined to be one who comes in by the forms of an election or an appointment, and he thus acts under claim and color of right, but in consequence of some informality, omission, or want of qualification, could not hold his office if his right was tried in a direct proceeding by an information in the nature of a quo warranto: See *Ex parte Strahl*, 16 Iowa, 369. And again: "A de facto officer is one who is in possession of an office and discharging its duties under color of authority, by which is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer": *State v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296. And for other definitions see 8 Am. & Eng. Ency. of Law, new ed., 781 et seq. In this case the officer, Robertson, had received a valid appointment from the sheriff of Collin county, the appointing power, but had failed to conform to the requirement of taking the oath and filing his commission for record. Moreover, he is shown to have entered upon the discharge of the duties of his office. The testimony shows that he had made one arrest, at least, prior to the one in which this case arose. The facts constituting him a de facto officer were not controverted. Could the court assume that he was such officer, or was it necessary that this question should have been submitted to the jury? This was not a case where the officer's authority was founded upon reputation alone, or where he was holding over after the expiration of his term, or where the officer was ineligible, or there was a want of power in the person appointing, or where the appointment was under an unconstitutional law. For aught that appears, the appointment was formal and regular in its terms, and he was acting at the time under color of appointment as a deputy sheriff. This does not appear to have been controverted, and we are of the opinion that the court correctly assumed he was a de facto officer.

It is also strenuously insisted by appellant that the court erred in failing to instruct the jury, as requested by him, that the acts

of appellant must have indicated an intention to injure the assaulted party, Robertson, before they could find him guilty of an assault. We have examined the charge of the court, and it nowhere tells the jury that violence upon the person of another must be with intent to injure him, before such person can be guilty of an assault. There may be cases where the court would be relieved from a charge upon this issue—that is, where the proof showed an obvious injury to the person; for in such case the intent to injure might be presumed, and under the statute it would then rest with the person inflicting the injury to show the accident or innocent intention. But where the violence used is of a slight character, or there is any suggestion that it was unintentional ⁴²⁰ or accidental, the court should give the jury a charge to the effect that such violence must be with intent to injure: See *Ware v. State*, 24 Tex. App. 521, 7 S. W. 240; *McConnell v. State*, 25 Tex. App. 329, 8 S. W. 275; *Floyd v. State*, 29 Tex. App. 341, 15 S. W. 819; *Rutherford v. State*, 13 Tex. App. 92. As stated before, the violence here was of a slight character. If the conviction is to rest upon any actual violence, it was merely in pushing by appellant of the prosecutor, Robertson. Prosecutor says: "Defendant pushed me back, and was trying to get at the door, and drew back like he was going to strike me." On cross-examination he says, "Defendant did not strike me, nor attempt to strike me, but he drew back like he was going to strike me"; that, when he told defendant to stop, he said, "All right"—that he only wanted to get out to give bond. Appellant himself testified that he tried to persuade Proffett to go with Robertson to the magistrate's office, and finally tried to take him there himself, but was unable to do so. He denies that while at the magistrate's office he pushed Robertson or attempted to strike him. That he did try to leave the office, and get Frank Douglas to go on his bond. That Robertson told him to stop, and he did so. That he did not, while on the street or in the magistrate's office, attempt to injure or hurt, or intend to injure or hurt, Robertson. Now, on this state of facts, we think it was the duty of the court to have given the instruction on the intent to injure, as requested by appellant; and for the failure to do so the judgment is reversed and the cause remanded.

De Facto Officers are discussed in the monographic note to *Hildreth v. McIntire*, 19 Am. Dec. 63-69. *De facto* officers are those who are in possession of office and discharging their duty under color of authority. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer: *State v. Oates*, 86 Wis. 634, 39

Am. St. Rep. 912, 57 N. W. 296. The acts of such an officer, when in good faith, afford protection to third persons and the public in dealing with them: *Oliver v. Mayor etc. of Jersey City*, 63 N. J. L. 634, 76 Am. St. Rep. 228, 44 Atl. 709; *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367. De facto officers have authority to prevent open violations of law in their presence by arresting the parties, and they also have authority to summon citizens to aid them in making the arrests: *Weatherford v. State*, 31 Tex. Cr. Rep. 530, 37 Am. St. Rep. 828, 21 S. W. 251.

BEER v. STATE.

[42 Tex. Cr. Rep. 505, 60 S. W. 962.]

FORGERY—Indictment—Revenue Stamps—Variance.—A revenue stamp forms no part of an instrument which is the subject of forgery, and it is entirely unnecessary to set it out or describe such stamp in an indictment charging forgery. An omission to allege its presence on the instrument constitutes no ground for variance between allegation and proof. (p. 811.)

Thomas, Spellman & Stine, for the appellant.

D. E. Simmons, acting assistant attorney general, for the state.

505 DAVIDSON, P. J. Appellant was convicted of forgery, and his punishment assessed at three years in the penitentiary. He was charged with forging a check in his own favor for thirty-five dollars, directed to the National Exchange Bank, Dallas, Texas, signing the name of F. Hesselson. On the trial the state offered the check in evidence, and objection was urged because it had lithographed upon it a United States internal revenue two cent stamp. The contention is that this constituted a variance, inasmuch as the indictment set out or described the instrument, omitting the stamp. To sustain this contention, it is necessary that the stamp form a part of the instrument. It has been held, almost without dissent, that indorsements upon a promissory note form no part of the instrument, and need not be set out in the indictment charging that the note was forged. It has also been held that it is not necessary to set out in the indictment any other matter written upon the same constituting no part of the instrument itself, and not entering into it as an essential description of the instrument. It has also been held in this state that on an indictment for forgery of a note, where the indorsements on the note were ignored, it was no objection to its admissibility in evidence on the ground of variance. It

was said that the indorsement was but an extrinsic and irrelevant writing, creating no variance: *Labbaite v. State*, 6 Tex. App. 257. The authorities are quite numerous and entirely harmonious to the effect that the revenue stamp forms no part of the check, draft or note: *Hallock v. Jaudin*, 34 Cal. 167; *People v. Tomlinson*, 35 Cal. 503; *Thomasson v. Wood*, 42 Cal. 416; *Trull v. Moulton*, 12 Allen, 396; *Porter v. Bank*, 19 Vt. 412; *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *Wilder v. Dellou*, 18 Minn. 470 (Gil. 421); *Cole v. Curtis*, 16 Minn. 182 (Gil. 161); *Cabbott v. Radford*, 17 Minn. 320 (Gil. 296); *State v. Hill*, 30 Wis. 416; *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695; *Green v. Holway*, 101 Mass. 246, 3 Am. Rep. 339. There are many other authorities to the same effect. We therefore conclude that the revenue stamp forms no part of the check, draft or other instrument. However, in the Illinois case, *supra*, it seems that the stamp was upon the face of the instrument, though not alleged so to be. If the stamp forms no part of an instrument, it is entirely unnecessary to set out or describe it in the indictment charging forgery: See, also, 8 Am. & Eng. Ency. of Law, 518, 521, for collation of authorities in notes. In *Miller v. People*, 52 N. Y. 304, 11 Am. Rep. 706, the accused was indicted for forging and altering a check. Upon the check introduced in evidence was the indorsement of the payee's name and the revenue stamp, neither of which was set forth in the description of the check contained in the indictment. Counsel for the accused urged the court to direct an acquittal on the ground of a variance between the indictment and the evidence. This was refused, and exception reserved. It was held that the omission did not constitute a variance, on the ground that neither the indorsement nor the revenue stamp forms a part of the check, which is a complete instrument of itself: See, also, *People v. Franklin*, 3 Johns. Cas. 299. The notes to this case cite *State v. Mott*, 16 Minn. 472 (Gil. 424), 10 Am. Rep. 152; *Laird v. State*, 61 Md. 310; *People v. Clements*, 26 N. Y. 195. It was therefore not necessary to set out in the indictment or describe the revenue stamp, as it formed no part of the instrument, and there was therefore no variance between the allegation and proof.

It also suggested there is a variance between the name "Hesselson" set out in the indictment and that upon the alleged forged check produced in evidence, and for our inspection the original check was properly certified and sent up in the record. An inspection of that instrument does not verify this conten-

tion. The evidence supports the conviction, and the judgment is affirmed.

The Crime of Forgery is the subject of a monographic note to *Arnold v. Cost*, 22 Am. Dec. 306-321. That an unstamped instrument may be the subject of forgery, see the monographic note to *Garland v. Gaines*, 84 Am. St. Rep. 197-199; *King v. State*, 42 Tex. Cr. Rep. 108, 57 S. W. 840, ante, p. 792, and cases in the cross-reference note thereto. The absence of a revenue stamp from a note has no bearing upon the question whether the defendant forged it: *State v. Peterson*, 129 N. C. 556, 85 Am. St. Rep. 756, 40 S. E. 9.

WITHERSPOON v. STATE.

[42 Tex. Cr. Rep. 532, 61 S. W. 396.]

RESISTING AN OFFICER—Validity of Writ as Defense.—If a writ in a civil suit is issued by a court of competent jurisdiction and is fair on its face, it is no defense for resisting an officer in the execution of such writ that it is merely informal and voidable and might be quashed in a civil proceeding. (pp. 816, 817.)

RESISTING AN OFFICER—Validity of Writ Question of Law. On a prosecution for resisting an officer in the execution of a writ issued in a civil suit, the validity and legal effect of such writ are questions of law for the court, and not of fact for the jury. (p. 817.)

CRIMINAL LAW—Conviction Under One Count—Error as to Other Counts.—If an accused is convicted under one count in an information, error, or supposed error in instructing the jury as to other counts is immaterial. (p. 818.)

RESISTING AN OFFICER—Writ as Evidence.—On a prosecution for resisting an officer in the execution of a writ issued in a civil suit, the writ is admissible in evidence notwithstanding objections to its validity in regard to merely formal matters, which might be good on a motion to quash in a civil suit. (p. 818.)

RESISTING AN OFFICER—Evidence.—If an officer is resisted in the execution of civil process and subsequently procures a warrant for the arrest of the person resisting, evidence of his acts and declarations at the time of his arrest are not admissible on his trial for resisting the officer in the execution of the civil process. Such matters relate to a separate and distinct offense. (p. 819.)

RESISTING AN OFFICER—Evidence.—On a prosecution for resisting an officer in the execution of civil process not invalid on its face, but simply voidable in a civil proceeding, evidence of its invalidity is not admissible. (p. 820.)

J. C. Smith, for the appellant.

D. E. Simmons, acting assistant attorney general, for the state.

533 **BROOKS, J.** Appellant was convicted for resisting an officer, under the first count in the information, and his punishment assessed at a fine of one dollar. The information is as follows: "In the name and by the authority of the state of Texas, Lee Hawkins, county attorney in and for the county of Ellis, state of Texas, duly elected and qualified, now here in county court of said county information makes that J. Y. Witherspoon, on or about the eleventh day of April, A. D. 1899, and before the making and filing of this information, with force and arms, in the county of Ellis, state of Texas, did unlawfully and willfully prevent and defeat the execution of a certain process in a civil cause, by means not amounting to actual resistance, but which were calculated to prevent and defeat the execution of said process; that is, W. P. Dunaway, who was then and there the duly qualified constable of justice precinct No. 6, in and for Ellis county, said state, had in his hands, and directed to him as such officer, for execution, a legal valid writ of sequestration, which had been issued from the justice court of justice precinct No. 6 of said Ellis county, in a civil cause in said court, wherein J. A. Brown and Susan Brown were plaintiffs and J. Y. Witherspoon was the defendant, numbered on the civil docket of said court 465, and which said process commanded the sheriff or any constable of said county to take into his possession one trunk, one clock, one white bonnet, two quilt tops, one silk handkerchief, one pair of gloves, one silk chair cushion, one parasol, one red handkerchief, one teapot, one shovel, some delftware, one dress, two gowns, and keep the same subject to further orders in said suit, unless replevied according to law. And while the said W. P. Dunaway, as constable aforesaid, was then and there in a lawful manner attempting to execute said process as therein commanded, the said J. Y. Witherspoon, knowing that the said W. P. Dunaway was constable aforesaid, and that the said W. P. Dunaway as such was attempting to execute said valid legal process, did unlawfully and willfully prevent and defeat the execution of the same by then and there refusing to permit the said W. P. Dunaway to take the said property into his possession, and by then and there threatening to kill the said Dunaway if he attempted to take possession of said property, and by pushing said Dunaway back from the stairway, thereby preventing him from going upstairs, where a part of the property was. And said county attorney does further information make that on or about the eleventh day of April, 1899, and before the making and filing of this complaint, in the county of Ellis, state of

Texas, the said J. Y. Witherspoon did unlawfully and willfully oppose and resist an officer in executing and attempting to execute a lawful process in a civil cause, in this: That W. P. Dunaway, who was then and there the duly qualified constable of precinct No. 6, in said Ellis county, had in his hands, as such officer, a legal, valid process, as follows: 'The state of Texas, to the sheriff or any constable of Ellis county, greeting: Whereas, Susan Brown has made affidavit that J. Y. Witherspoon unlawfully ⁵³⁴ detains from her the following described property: One trunk, one clock, one white bonnet, two quilt tops, one silk handkerchief, one pair of gloves, one silk chair cushion, one parasol, one red handkerchief, one teapot, one shovel, some delftware, one dress, two gowns, of the value of five dollars—the property of her, the said Susan Brown, to the possession of which she has a good and lawful right, and for the recovery of which she has brought suit; and that she fears that the defendant, J. Y. Witherspoon, will ill-treat, injure, waste, destroy, and remove from the county said property during the pending of this suit—these are therefore to command you that you take into your possession the above-described property, if to be found in your county, and to keep the same subject to further orders in said suit, unless replevied according to law. Herein fail not and due return make. Given under my hand this the eleventh day of April, A. D. 1899. P. W. Lowe, Justice of the Peace, Precinct No. 6, Ellis County, Texas.' And while the said W. P. Dunaway, constable as aforesaid, was then and there, in a lawful manner, attempting to execute the said process as therein commanded to do, the said J. Y. Witherspoon did unlawfully and willfully resist and oppose him in so doing, by then and there threatening to kill the said Dunaway before he would permit him to take said property, and by then and there pushing the said Dunaway down and away from a stairway with his hands, thereby preventing the said Dunaway from going upstairs, where some of said property was. And said county attorney does further information make that on or about the eleventh day of April, 1899, and before the making and filing of this complaint, in the county of Ellis, state of Texas, the said J. Y. Witherspoon, in and upon W. P. Dunaway, did commit an aggravated assault, and did then and there push the said Dunaway with his hand, the said Dunaway then and there being an officer, to wit, constable of justice precinct No. 6, Ellis county, said state, and then and there in the lawful discharge of the duties of said office, and the said J. Y. Witherspoon then and there being informed

and knowing that the said W. P. Dunaway was then and there an officer discharging an official duty, contrary to the form of statute in such cases made and provided, and against the peace and dignity of the state."

Motion was filed by appellant to quash the information, but an inspection thereof shows it relates solely to the second count thereof, and does not refer to the first count, on which the conviction was had. We deem it proper, however, to pass upon the first count in the information, regardless of whether or not appellant's motion refers thereto. Furthermore, we hold all of the counts in the information are valid.

Article 4865 of the Revised Statutes provides: "No sequestration shall issue in any case until the party applying therefor shall file an affidavit in writing stating: 1. That he is the owner of the property sued for, or some interest therein, specifying such interest, and is entitled to **535** the possession thereof; or 2. If the suit be to foreclose a mortgage or enforce a lien upon the property, the fact of the existence of such mortgage or lien, and that the same is just and unsatisfied, and the amount of the same still unsatisfied, and the date when due; 3. The property to be sequestered shall be described with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which the same is situated; 4. It shall set forth one or more of the causes named in the preceding article entitling him to the writ." Article 4869 of the Revised Statutes provides, in substance, that the writ must describe the property as it is described in the affidavit.

Were this a civil proceeding, upon motion filed, the court might quash the writ copied in the information here, on the ground that the value of each article of property, and the county in which the same is situated, is not stated in said writ. But we apprehend a different rule prevails where a defendant is proposing to justify resistance to an officer in the execution of a writ with this character of defect from the rule on a motion to quash the writ, and the affidavit upon which it is predicated, in a civil suit. Judge Cooley, in his work on Torts, in treating this matter, used the following language: "The process that shall protect an officer must, to use the customary legal expression, 'be fair on its face.' By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form, but

what is intended is that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it. The word 'process' is made use of in this rule in a very comprehensive sense, and will include any writ, warrant, order, or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property which, if not justified, would constitute a trespass. Thus, a *capias ad respondendum*, or any warrant of arrest, is process; so is a writ of possession; so is any execution which authorizes a levy upon property; and so is any authority which is issued to a collector of taxes, and which purports to empower him to collect the taxes by distress of goods. These are only illustrations of a class too numerous to be specified in detail": See Cooley on Torts, 2d ed., 538, 539, 560.

Mr. Mechem says: "The duty of the officer is ministerial, not judicial. His province is to execute the process regularly delivered to him for service, and not to sit in judgment upon the regularity of ⁵³⁶ the proceedings upon which it was obtained. He is protected by the law, as will be seen hereafter, in executing according to its tenor all process, fair upon its face, which is delivered to him for service. He will therefore be protected in executing, and it is his legal duty to execute, process, though it be irregular, erroneous, or voidable, where it comes in due form from a court of competent jurisdiction, and neither his own intrinsic knowledge that there existed no cause of action, or that the judgment, not reversed or stayed, was fraudulently obtained, nor the fact that the judgment or proceedings were irregular, nor any other defect or irregularity not rendering the process void, can excuse him from its service. 'Mere formal defects in the process,' it is said, 'not rendering it void, even if considerable enough to cause it to be abated, quashed, or set aside as irregular, on proper motion or plea by the party directly affected by it, but which, if not so moved, do not affect the legal validity of the process, can never be interposed by the officer in whose hands it is placed for service as a

shield to protect him from the consequences of plain derelictions of duty in respect to it.' A distinction is, however, to be observed between process which is irregular, defective, or voidable only and that which is void for want of jurisdiction or other cause": Mechem on Public Officers, sec. 745. And again: "Where process, fair upon its face, is put into the officer's hands for service, it is his duty, as has been seen, to proceed to execute it according to its command. Out of this duty arises the necessity of protection, and the rule is well settled that for the proper service of such process the officer incurs no liability, however disastrous may be the effects upon the defendant, or however unlawful may have been the proceedings which preceded it. The process which will afford the officer this protection, as being fair upon its face, has been defined by Judge Cooley as that 'which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority': Mechem on Public Officers, sec. 768. It is laid down in Wharton on Criminal Law, section 425, that where a warrant is merely informal, but not illegal or senseless, its informality will be no palliation for the killing of the officer intrusted with its execution.

From the foregoing it appears that defendant could not be prosecuted for resisting a void writ, but an informal or voidable writ, where it comes from a court of competent jurisdiction, as the writ alleged in the information in this case, would justify and authorize an officer to execute the writ, and if defendant resists that character of writ he would be guilty, regardless of any mere informalities in the writ.

Appellant asked the court to charge the jury that if they believed from the evidence that said W. P. Dunaway, constable, was attempting to execute a writ of sequestration, but it was not a valid and legal writ, as required by law, to acquit. In his main charge the court gave the following in substance: "If you believe from the evidence beyond a ⁵³⁷ reasonable doubt that defendant did . . . prevent or defeat the execution of any process in a civil cause, by any means not amounting to actual resistance, but which were calculated to prevent the execution of such process, you will find defendant guilty," etc. We do not think the court erred in refusing the special instruction, since it relegated to the jury the question of the validity and legal effect of the writ. This was a question for the court, and not the jury to decide. In other words, it was the duty of the

court to tell the jury that the writ introduced was in fact a valid and legal writ. His special charge No. 2 is also with reference to the legality of the writ, submitting that the affidavit on which the writ of sequestration is issued must describe the property so that it may be identified and distinguished from property of a like kind, giving the value of each article and the county where situated. As stated before, it is immaterial, so far as this prosecution is concerned, whether the writ was exactly formal or not, and whether it corresponds exactly with the affidavit. If the writ, as said by Judge Cooley, is fair on its face, although informal, and although it might be quashed in a civil proceeding, yet these matters would not be any defense to appellant, nor any reason why the officer would not be protected in an effort to execute the same.

The fifth ground of appellant's motion complains of the third paragraph of the court's charge. The charge is numbered by paragraphs, but this complaint seems to relate to a portion of the charge with reference to the second count in the information. The jury having found appellant guilty under the first count, it is immaterial as to any error or supposed error in the charge as to the second count in the information.

It is made to appear by bill of exceptions No. 1 "that the state offered in evidence the writ of sequestration, to which counsel for the defendant objected: 1. The writ of sequestration, the execution of which defendant is charged with resisting, shows on its face that it is invalid, because it failed to describe the property sought to be sequestered with such certainty that it may be identified and distinguished from the property of a like kind, and failed to give the value of each article of the property, and to show in what county the same was situated; 2. Because the writ showed Susan Brown was plaintiff in the civil cause, when defendant was charged with resisting a writ in cause in which J. A. and Susan Brown were plaintiffs; 3. Because the affidavit on which said writ was issued was wholly insufficient and defective to support said writ, and admitted so to be by counsel for state, and the court overruled the objections, and permitted the writ to be introduced." A reference to the information shows objection No. 2 does not lie against the first count, upon which appellant was convicted, since that charges that J. A. and Susan Brown were plaintiffs, and J. Y. Witherspoon was defendant. As said above, the objections might or might not be good (on the matter we are not passing) in a ⁵³⁸ motion to quash the writ in a civil case; but, even conceding they are, they are without merit when urged by appellant as defense in this case.

Bill No. 2 states that "the state offered to prove the following facts, viz.: While witness W. P. Duniway was on the stand, and had testified that, at the time of the arrest of defendant, he (defendant) resisted said arrest and told said Dunaway and Deputy Sheriff Forbes, with him, that they could not arrest him, and after said Dunaway had testified that defendant did not try to strike the officers, that they, said Dunaway and Forbes, arrested defendant, and handcuffed him, to which counsel for defendant objected, for the following reasons: Because defendant was not charged with resisting a warrant of arrest, and any testimony as to what said defendant said or did at said time was irrelevant, and had no connection with the case, and tended to prejudice, and did prejudice, the jury against the defendant; and the court overruled the objections, and permitted said witness to testify as aforesaid. Defendant excepted to said ruling," etc. The court qualifies this bill as follows: "That W. P. Dunaway had testified that he went to the house of defendant about 9 o'clock in the morning to levy the writ of sequestration, and defendant resisted, and prevented the execution of the same. That witness left house of defendant. A complaint was filed against defendant for resisting the execution of said writ of sequestration, and warrant was issued and placed in the hands of said Dunaway, and about 5 o'clock in the evening of the same day said Dunaway and Henry Forbes, deputy sheriff, went back to the house of defendant, for the purpose of executing the writ of sequestration and the warrant of arrest. Upon the arrival at house of defendant, he told said Dunaway and Forbes that they could not arrest him, and that there were not men enough in Ellis county to arrest him. And defendant's attorney took this bill of exceptions substantially as stated above. But on the trial of this case Henry Forbes testified that, before anything was said by either him or Dunaway about arresting defendant, he (Forbes) told defendant that they had come after those things; that defendant replied they could not get them; and that he (Forbes) then told defendant they would 'take the goods, and him too,' and proceeded to arrest defendant and handcuff him, and while he (Forbes) held defendant, Dunaway executed the writ of sequestration." We do not think this testimony is admissible. It was permissible to prove the gravamen of the offense charged in the information; but, on the question of resistance of the warrant of arrest, if appellant subsequently resisted the execution of the civil process—the writ of seques-

tration—this would be a separate and distinct offense, in no way connected with, illustrative of, or tending to prove any issuable fact in the case then on trial. The learned judge should not have permitted the introduction of this testimony.

⁵³⁹ Bill No. 3 complains that appellant offered in evidence bond and affidavit for sequestration, for the purpose of showing that same was insufficient, invalid, and void, and that the writ of sequestration, execution of which it was charged defendant resisted, was illegal, invalid, and void. On the objection of the state, it was excluded. We do not think the court erred in this ruling. As indicated above, the writ of sequestration, put in its strongest light in favor of appellant, was simply voidable on its face. The officer had a right to execute the same, being from a court of competent jurisdiction, under the proper signature of the justice of the peace. We note that the information charges appellant did unlawfully and willfully prevent the execution of certain process, etc. Upon another trial the charge of the court should follow this allegation. For the error discussed in admitting the testimony complained of, the judgment is reversed and the cause remanded.

Process Fair upon Its Face and issuing from a tribunal or person having judicial power with apparent jurisdiction to issue it, protects a ministerial officer in obeying its mandate: See monographic note to *Savacool v. Boughton*, 21 Am. Dec. 190; *Ward v. Deadman*, 124 Ala. 288, 82 Am. St. Rep. 172, 26 South. 916; *Hamner v. Ballantyne*, 13 Utah, 324, 57 Am. St. Rep. 736, 44 Pac. 704; *State v. Devitt*, 107 Mo. 573, 28 Am. St. Rep. 440, 17 S. W. 900. But process void upon its face affords him no protection: *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11; *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379, 46 N. E. 562. On the abuse of process, see the monographic note to *Bradshaw v. Frazier*, 86 Am. St. Rep. 397-411; and on the right to resist criminal process, see the monographic note to *State v. Evans*, 84 Am. St. Rep. 697-703.

JANNIN v. STATE.

[42 Tex. Cr. Rep. 631, 51 S. W. 1126, 62 S. W. 419.]

CONSTITUTIONAL LAW—Sale of Passenger Tickets.—The state may, in its constitutional exercise of the police power, prevent the pursuit of the occupation of a passenger ticket broker and restrict the right to sell such tickets to agents prescribed by statute, under a penalty for its violation. (p. 823.)

RAILROAD or Other Passenger Tickets are not Property in which third persons can have vested rights. They are mere tokens or evidences of a right to transportation held by the purchaser, to which the carrier has title, and the ultimate right of possession. (p. 823.)

CONSTITUTIONAL LAW—Sale of Passenger Tickets.—A statute confining the sale of railroad or other passenger tickets to the agents of the company issuing them, and making it a penal offense for any other person to sell them, is a valid exercise of the police power and not unconstitutional as tending to create a monopoly or as depriving a person of his property without due process of law. (p. 825.)

CONSTITUTIONAL LAW—Sale of Passenger Tickets—Statute Regulating.—A statute making the sale of a railroad passenger ticket by other than an agent of the company a penal offense when it contains upon its face a statement that such sale is penal, but leaving it optional with the company whether or not the ticket shall contain such statement, is void under a constitutional provision forbidding the legislature to delegate its authority to suspend a law. It is also unconstitutional in failing to define with certainty an offense, and as not of itself creating an offense, and as giving to a railroad company the option to create an offense. (p. 826.)

R. L. Summerlin, and E. Haltour, for the appellant.

Upson, Bergstrom & Newton, W. W. Walling, and M. Trice, assistant attorney general, for the state.

639 **HENDERSON, J.** Appellant was convicted of selling a railroad ticket, not being the agent of any railroad company and authorized thereto, under the act of the twenty-third legislature, page 97, and his punishment assessed at a fine of five dollars and appeals.

The indictment sets out by exhibit the ticket alleged to have been sold, which is as follows:

“Issued by Galveston, Harrisburg & San Antonio Ry. Co. Excursion Ticket 5-4, good for one first-class passage San Antonio to Houston (Depot). This ticket is not good for stop-over privileges, and will not be honored for any part of the trip after midnight of May 7, 1894.

"Notice.—It is a penal offense for the purchaser or holder of this ticket to sell, barter, or transfer the same for a consideration, and this ticket or any unused part thereof is redeemable by the company at any ticket office of the company when presented for redemption within ten days after the right to use the same has expired by limitation of time as stipulated herein.

"One way rate, \$6.30.

"Round Trip Rate, \$—.

"Form S. B.

"L. J. PARKS, Ass't. G. P. & T. A."

It is alleged substantially that appellant without lawful authority sold said railroad ticket to one E. A. Metcalfe, he, the said Jannin, not being the agent of the said Galveston, Harrisburg, & San Antonio Railway Company for the purpose of selling tickets, and having no certificate of authority to make the sale of the same, etc. No objection was urged to the indictment, but it is insisted that the law of the twenty-third legislature making it a penal offense for any other person than the agent of a railroad company to sell passage tickets is unconstitutional, ⁴⁴⁰ (1) because the law prohibiting the selling of tickets by persons not having a certificate of authority to sell is not a police regulation adopted by the legislature in the legitimate exercise of the police power; (2) the law is invalid in this, it delegates to railway companies the power to make the sale of tickets lawful or unlawful; (3) railroad transportation ticket is property.

In this connection appellant contends that said act is violative of section 19 of the Bill of Rights, as follows: "No citizen of this state shall be deprived of life, liberty, property, immunities, . . . except by the due course of the law of the land." "Sec. 26. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." These questions have all been so thoroughly discussed under similar laws of other states, that it would appear to be a work of supererogation to reiterate what other courts have said on this subject; and in the face of a number of able decisions of other states, we would not undertake to add anything new to the discussion of the questions here involved: See *Commonwealth v. Wilson*, 14 Phila. 384; *Fry v. State*, 63 Ind. 560, 30 Am. Rep. 238; *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *People ex rel. Tyroller v. Warden of City Prison*, 26 App. Div. 228, 50 N. Y. Supp. 56; and the same case reported in court of appeals of New York, *People*

v. Warden of City Prison, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006. By reference to the above cases it will be seen that this constitutional question with reference to scalpers' tickets in one shape or another has been before the courts of the several states mentioned, and the holding was in favor of the constitutionality of the law in all of said states except New York. In Tyroller's case, from that state, it was held on a proceeding in habeas corpus to the appellate division of the supreme court, by a unanimous court, that the scalper's law of that state was constitutional, in that it did not deprive a citizen of his property without due course of the law of the land, nor did it confer an exclusive privilege upon any class of persons so as to be a monopoly; and it was within the police power of the state legislature to pass such a law. It was moreover held that it was not violative of any provision of the constitution or laws of the United States with reference to interstate commerce. This case was taken to the court of appeals of said state, and there, by a divided court of four to three, the law was held to be unconstitutional. In that case the learned chief justice appears to consider that the passage ticket of a railway company is property, and any law which attempts to restrain or inhibit the disposition and sale of same is pro tanto a violation of the constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law. Again, that opinion holds that the attempt of the legislature to confine the sale of railroad passage tickets to the agents named in the act was the creation of a monopoly, and that the legislation in question inhibited by said provisions of the constitution of New York did not come within the police power of the legislature. A number of cases are cited in favor of the opinion. It will be observed, however, ⁶⁴¹ that there is a marked distinction between the New York law and our statute on this subject, in that the New York statute, by the construction placed on it by Judge Parker, authorizes not only the agents of the particular corporation to make sales of such tickets, but the agents of other transportation companies; and in the opinion the learned judge lays stress on this construction of the statute, as class legislation and creating a monopoly. As stated before, the opinion of the New York court of appeals on this subject runs counter to all of the authorities that have come under our observation. That court itself was divided on the subject, and in our opinion the very able discussion by Judge Parker is more than answered by the dissenting opinions of Justices Bartlett and Martin. These treat a passage ticket on

a railroad company not as property in its general sense, but as a token of the purchaser's right to be transported on the railroad between the points named in the ticket. We quote as follows: "The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger to be held by him temporarily for a special purpose, and he, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be delivered to the conductor. It serves a threefold purpose: It is evidence in the passenger's hands that he has paid his fare, and has a right within the cars; it insures the payment of the passage money by all who take seats; and when it is redelivered to the company it becomes a voucher in its hands against the officer or agent who issued it in the adjustment of its accounts. It thus appears that the original and legitimate function of the ticket is to carry out a transaction between the carrier and the passenger—the ticket being the property of the carrier; still the passenger is entitled to retain it in his possession until the completion of his journey." And again: "Railroad and steamboat tickets can in no proper sense be regarded as property in which third persons have any vested interest. They are mere tokens or evidences of a right to transportation, in which event the traveler, who has purchased one, has but a special interest, and to which the companies have title, and the ultimate right of possession." They hold, in accordance with the views of other courts, that the act of the legislature restricting the right of sale to the agents prescribed in the act was within the police power of the state, and not violative of any provision of the constitution; that in the exercise of its police power the state was authorized to prevent the pursuit of the occupation of ticket brokers upon the ground that it was harmful to the public, and the difficulty in circumventing the fraud was so great that no other efficient means could be found.

We hold, in accordance with what we conceive to be the current of authority, and the sounder view on this subject, that the legislature was authorized, as was done in this act, to confine the sale of passage tickets on railroad companies to the agents of such companies, and to make it penal for any other person to make a sale of same. The ticket of a railroad company is not property in the general acceptation of the ⁶⁴² term, but the purchaser has only a special property in the ticket as evidencing his right to passage on the road; that common carriers within this state are peculiarly subject to regulation; and to preserve

and protect both the passenger and the company itself against fraud, is within the province of the police power of the state, and not violative of any provisions of the constitution. Nor can it be said that such regulation is in any wise the creation of a monopoly. Unlike the New York statute, our act confines the sale of passage tickets to the agents of the railroad company itself, and does not authorize the agents of other companies to make the sale of the same (unless such agents be also the agents of the company in question). This is simply authorizing the railroad company to conduct its own business. And again, it cannot be urged that the act in question deprives the citizen of his property without due course of law. It does not seek to confiscate his property. It says to the citizen, if he desires to be transported on any railroad, he can go to one of the agents and buy a ticket for that purpose, and pursue his journey. If from any cause he should fail to pursue his journey in whole or in part, it authorizes him to call on an agent of the company and have his money refunded. It occurs to us as absurd to say that a regulation of this character cannot be adopted, both on behalf of the railroad companies and of the general public, under the police power of the state, without violating some sacred provision of the constitution. However, appellant raises what we consider a more serious question. He contends that the act leaves it optional with railroad companies as to whether or not they will make the sale of passage tickets a penal offense, inasmuch as it is left optional with each railroad company in the sale of tickets whether or not they will indorse on same the following provisions of the act: "Provided, that the provisions of this act shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell, barter, or transfer said ticket for a consideration." In reply to this it is urged that the act makes it the duty of each railroad company to print said proviso conspicuously across the face of every ticket sold by its duly authorized agent. While it is true the act in this section requires this, yet is it a sufficient answer to the proposition that it is still optional with the railroad company to make the sale of passage tickets a penal offense? It will be observed that no penalty is attached to the failure of the railroad company to print across the face of its ticket said proviso. It is merely made a duty, which they may comply with or not as they see fit. It would have been a very easy matter for the legislature to have confined the sale of all passage tickets to the agents of the railroad companies, without any require-

ments as to the form of the ticket. But this course was not pursued. As it is, every railroad company has the option to issue a passage ticket with this proviso or not as it may see proper. If it issues a ticket without this proviso, it is not a penal offense; and in every such case scalpers and all others may deal in such passage tickets without any violation of the law. We accordingly hold ⁶⁴³ that because the legislature left it optional with the railroad companies whether or not in the issuance of tickets they would create a penal offense, that the act of the legislature is without authority of law; is violative of the law in that it does not define with certainty an offense; does not itself create an offense, but delegates its authority to another agency to make the sale of railroad tickets a violation of the law. In this respect it would appear to be violative of section 28 of our Bill of Rights, which says, "No power of suspending laws in this state shall be exercised, except by the legislature": See Sutherland on Statutory Construction, sec. 69. We therefore hold that the sale of railroad passage ticket in this case is not a violation of law.

The judgment is reversed and the prosecution ordered dismissed.

Brooks, J., dissents from the conclusion reached by the majority of the court.

ON MOTION FOR REHEARING.

HENDERSON, J. It is strongly insisted that the court erred in its original opinion in holding that the act in question delegated the power to railroad companies to make the traffic in passage tickets a penal offense as they might see proper, in that it is contended that, although it may be optional with railroad companies to make the indorsement on passage tickets which is provided by law and make traffic in the same a penal offense, yet this would not be such delegation of legislative power as would render the act invalid. In this connection we are furnished with the history of the passage of the act, and that it was recognized that a certain class of tickets, though for passage in this state, being sold abroad, could not be reached here. If we were willing to concede that proposition, still it would not follow, if the act gives authority to railroad companies to legislate as to the character of ticket which it is unlawful to traffic in, that it would not be void because the legislature had some other object in view. We are cited to a number of cases on this subject, but none of them, we take it, are decisive of the question here presented. The oleomargarine cases referred to pro-

hibit the sale of all oleomargarine packages, except marked as required by law. While it is true oleomargarine was thus divided into two classes, that which was unmarked and that which was marked, none could be sold unless it was marked. That is, oleomargarine could not be an article of commerce—could not be used for sale, unless packages were marked as required. Not so with the railroad tickets under this act. They could be used for passage whether marked or not, whether indorsed or not; but the person who trafficked in the ticket indorsed as provided by law could be punished, while one who had purchased a ticket which was not indorsed and paid for it the same money as the other, could not be punished.

In *Debardeladen v. State*, 99 Tenn. 649, 42 S. W. 684, ⁶⁴⁴ cited by counsel, there was nothing remaining to be done by any other person to make the act effective, except betting on horse-races. Persons were only authorized to bet on the same on a certain character of racecourse, and no others; and this applied to all alike. The case of *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495, though not cited in the brief of counsel, is more in point as supporting his contention. In that case the act, which authorized the President to decide when certain foreign countries discriminated against the United States as to imports, and in such case to change the duties on certain imported articles from such countries or to suspend their free introduction, was held to be constitutional, as not transferring the legislative power to the President. That case, however, was not by a full court; and in our opinion, the dissenting views of Chief Justice Fuller and Justice Lamar announced the correct doctrine. In *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72, 45 Am. St. Rep. 650, 30 Atl. 943, it was held that the statute providing for a uniform contract or policy of fire insurance to be made and issued by all insurance companies taking fire risks on property within the state, directing the insurance commissioners to prescribe a standard policy of insurance and forbid the use of any other, is unconstitutional as an unauthorized delegation of legislative power. The doctrine there announced is to the effect that the law must be complete in all its terms and provisions when it leaves the legislative branch of the government. We take it that the law here involved leaves it optional with railroad companies as to whether or not they will adopt a certain character of tickets. If they do adopt the prescribed form, they constitute a penal offense against anyone who deals in that character of tickets; while if they exercise their option and leave

off the indorsement, it is not a penal offense to deal in such tickets. In the original opinion we upheld the law as within the province of the police power of the state, in that it was a regulation to preserve and protect both the passenger and the company itself against fraud and imposition. But if it is left to railroad companies to issue their passage tickets, some with and some without the indorsement which constitutes a traffic in such tickets a penal offense, then the very safeguard intended for the protection of the public against fraud is broken down and rendered nugatory by the option bestowed on the railroad companies. To guarantee the protection intended, the law must be uniform in its operation; and to authorize railroad companies to make a certain character of ticket a penal offense, it occurs to us, is a delegation of an unauthorized legislative authority. The motion for rehearing is overruled.

Brooks, J., absent.

POWER OF STATE TO CONTROL SALE AND USE OF PASSENGER TICKETS.

- I. As Exercise of Police Power.**
- II. Interstate Commerce.**
- III. Due Process of Law.**
- IV. Class Legislation.**
- V. To Whom Statutes Apply.**

I. As Exercise of Police Power.—In a considerable number of the states of the United States statutes exist which have for their object the regulation of the sale and redemption of transportation or passenger tickets of common carriers. Such statutes usually provide that the violation thereof shall constitute a crime and fix the punishment therefor. These statutes, generally speaking, confine the sale of transportation tickets within narrow bounds by making it unlawful for any person, except a common carrier by land or water, or his authorized agent, to sell or deal in transportation or passenger tickets. The validity of statutes of this nature has been attacked at various times and on various grounds, and the proposition thus presented to the courts for decision may be thus stated: Is it competent for the legislature, in the exercise of the police power of the state and in regulating the sale of passage tickets by common carriers, to prohibit sales by ticket brokers, unless they are duly authorized to make such sales by the owners or charterers of vessels or by the company running the railway train upon which or for which passage tickets are offered for sale. In other words, whether it is competent for the legislature, in the exercise of the police power, in order to prevent frauds in the sales of passage tickets by land and water, to confine their sale to the individuals and corporations issuing them or their duly authorized agents? The decision of

this question naturally involves the determination of another question, namely, has any other person, without authorization, such an inalienable right to deal in these tickets by purchase and sale that to deprive him of it is to strip him of his rights, liberty, privileges and property without the judgment of his peers and due process of law?

Wherever these questions have been presented to the courts for decision it has been almost uniformly decided that it is a reasonable and proper exercise of the state police power by the legislature, when seeking to put an end to frauds in the sale of passage tickets, to require carriers, who are usually created by legislation, to sell their own tickets either directly or through duly authorized agents, and that in the exercise of such power personal and property rights are not invaded to such an extent that constitutional provisions are violated and statutes of the nature of those under consideration rendered invalid.

The courts generally hold that the legislature, in the constitutional exercise of the police power, has a right to say to the common carrier, so as to bind him, You must select and duly commission the agents who are to sell your passage tickets, and no one else shall engage in that business; and it has a right to say to all other persons, You shall not, without incurring a penalty, engage in buying and selling passage tickets unless authorized so to do. This is the effect of the decision in the following cases: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Commonwealth v. Wilson*, 14 Phila. 384; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472. In passing upon the constitutionality of a statute regulating the sale and redemption of transportation tickets of common carriers, the court, through Mr. Justice Mitchell, in *State v. Corbett*, 57 Minn. 348, 59 N. W. 317, said: "That the transportation of passengers by common carriers is a proper subject of police regulation by the state is unquestioned, and if a business itself is the subject of police regulation, then so are all its incidents and accessories. That the matter of the issue and transfer of tickets, as evidence of the contracts of carriers, is an incident and accessory of the business, needs no argument. And where a business is a proper subject of the police power, the legislature may, in the exercise of that power, adopt any measures, not in conflict with the same provision of the constitution, that it sees fit, provided, only, they are such as have some relation to, and some tendency to accomplish, the desired end, and, if the measures adopted have such relation and tendency, the courts will never assume to determine whether they are wise, or the best that might have been adopted." To the same effect is the decision in *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948, that the business of a railroad carrier, and incidentally the manner of the sale of its tickets, is a proper subject for the exercise of the

police power of a state, and may be regulated by legislative action, and that a statutory requirement that railroad tickets shall be sold only by authorized agents is merely a police regulation as to the manner in which the business of the carrier shall be conducted, and is not unconstitutional as a grant of a special privilege to a class of persons, nor as creating a monopoly of the ticket business, nor as an abridgment of the privileges or immunities of citizens. The only decisions opposed to the rule above set forth and to the cases cited as sustaining it, are those of the state of New York. It is now the settled law of that state that a statute which prohibits and subjects to punishment as a crime the selling of tickets for passage on vessels or railroad lines by any person except common carriers and their specially authorized agents, transcends the police power and violates the constitutional guaranties of civil rights and privileges and of liberty, in so far as it undertakes to prohibit citizens of the state from engaging in the business of brokerage in such passage tickets. This ruling was first made by a divided court of four judges to three in the case of *People v. Warden of City Prison*, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006. But it has subsequently been reaffirmed and followed in *People v. Caldwell*, 64 App. Div. (N. Y.) 46, 71 N. Y. Supp. 654, and the latter decision is affirmed in 168 N. Y. 671, 61 N. E. 1132.

It may not be amiss to add here that it has been held by a divided supreme court that it is beyond a reasonable exercise of the police power, and unconstitutional, for a state to enact a statute seeking to compel the transportation of passengers by one carrier on the credit of another to which money for the payment of a fare has been advanced by the purchaser of a mileage ticket, and that one carrier cannot be given power to determine the conditions upon which another must carry its passengers: *Attorney General v. Old Colony R. R.*, 160 Mass. 62, 35 N. E. 252.

II. Interstate Commerce.—Statutes which prohibit, under a penalty, the selling of passenger tickets by any person other than a common carrier and his specially authorized agent or agents, have been attacked as unconstitutional as an attempt to unduly interfere with interstate commerce, but we believe it to have been universally decided wherever that question has been presented that such statutes do not in any way interfere, nor attempt to interfere, with interstate commerce, and hence are not unconstitutional on that ground: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472. In *State v. Corbett*, 57 Minn. 354, 59 N. W. 317, it was said: "There is clearly nothing in the objection that the act unlawfully interferes with interstate commerce. In the first place, the question is not in this case because the ticket is not for an interstate ride. But even if it was, there would be nothing in the point.

The law is not a revenue law, and is not designed to, and does not, regulate interstate commerce at all. It is a mere police regulation of the sale and transfer of tickets, designed to protect the public from frauds, and its interference, if any, with interstate commerce is purely incidental and accidental. The grant of power to Congress to regulate interstate commerce was never designed to, and does not, at all interfere with police power of the states to promote domestic order, to prevent crime, and to protect the lives and property of its citizens, although such regulations may indirectly operate upon and affect interstate commerce. Such regulations are valid in spite of their operation on commerce, and the right to pass them does not originate from any power in the state to regulate commerce." And again, in *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 247, the court said: "It cannot be said, we think, that the statute of this state, above quoted, in any manner impedes, obstructs or casts any burden upon the free course of commerce, in so far as interstate passenger travel is concerned. The statute imposes certain prescribed duties upon common carriers of passengers and their agents, but the discharge of these duties does not and cannot, as it seems to us, obstruct or hinder, or cast any burden upon, the commerce of the country or interstate passenger travel. The act absolutely prohibits and makes unlawful the sale, barter, or transfer within the state, by any person not authorized thereunto, as provided in said act for any consideration whatever, of the whole or any part of any ticket or tickets, etc. Thus far forth the provisions of the statute must be regarded, as we have already said, as police regulations, the evident object and purpose of which were to prevent and prohibit a general brokerage business in the purchase of such tickets, etc., and the unused portions thereof. We fail to see that these regulations are obstacles to, or burdens upon, interstate commerce in any sense of that term."

III. Due Process of Law—Equal Protection of Law.—Statutes regulating the sale of passenger tickets and confining their sale under a penalty to the carrier issuing or to his authorized agent, have been attacked from time to time as depriving citizens of their property without due process of law, and as denying to them the equal protection of the laws as guaranteed by the national and by state constitutions. This question is generally answered by the courts by deciding that railroad and steamboat tickets, or other passenger tickets, can in no proper sense be regarded as property in which third persons have any vested right or interest. They are mere tokens or evidences of a right to transportation in which even the traveler who has purchased one has but a special interest, and to which the carrier has the title and the ultimate right of possession. The sale of such tickets by persons other than the carriers or their agents as a business is not an employment in which they have any unqualified right to engage, as the ticket is a mere incident to the business of the carrier in transporting his passenger, possessing none of the ordi-

nary elements of property, and cannot, without the consent of the carrier form the basis of a legitimate independent business. Third persons have no constitutional right to interfere with the relations between the carrier and passenger by the purchase and sale without its consent of tickets issued by the former. Hence statutes which confine the purchase and sale of such tickets to the carrier or his authorized agent can in no way deprive a third person of his property without due process of law nor deny to him the equal protection of the law: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *Commonwealth v. Wilson*, 14 Phila. 384; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472. A similar rule has been adopted in California where the supreme court has decided that a municipal ordinance regulating the issuance and delivery of street-car transfers, requiring them to be delivered only by the street-car from which the transfer is made and received only by the car to which they are made, and forbidding any person except the conductor or agent for the street-car line to give, sell or issue, any transfer check or ticket issued for passage on any street-car or line, does not violate the constitutional guaranty protecting personal liberty or the right of private property, and is not arbitrary or oppressive, nor an illegal attempt to enforce the obligations of private contracts by penal legislation, but is a valid exercise of the police power expressly granted to municipalities: *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68.

A contrary rule prevails in New York. It has been there held that a statute undertaking to make it a crime for a person to sell, or offer for sale, any passage ticket for passage or conveyance upon any vessel or railway train, unless he is the authorized agent of the owner or consignees of such vessel or corporation running such train, provided that the authorized agent of any transportation company may purchase from the properly authorized agent of any other transportation company, a ticket for a passenger to whom he may sell a ticket to travel from any point on the line for which he is the properly authorized agent, so as to enable the passenger to travel to the place or junction from which his ticket shall read, is unconstitutional and void as applied to third persons who are not authorized to sell such tickets, because it may be the means of depriving them of their liberty to follow the business of ticket selling and of their property in such tickets without due process of law: *People v. Warden of Prison*, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006; *People v. Hagan*, 35 Misc. Rep. 155, 71 N. Y. Supp. 461; *People v. Caldwell*, 64 App. Div. (N. Y.) 46, 71 N. Y. Supp. 654, affirmed, 168 N. Y. 671, 61 N. E. 1132. These cases necessarily hold, in order to sustain the doctrine promulgated therein, that a passenger ticket is properly in the hands of the holder whoever he may be.

IV. Class Legislation.—Statutes confining the sale and redemption of passenger transportation tickets to the common carriers issuing them and to their regularly authorized agents, and providing a punishment for a violation of the statute in this respect, have also been attacked as unconstitutional in this, that they are class legislation which create a monopoly and grant special privileges. This proposition the courts universally deny, and hold that such statutes do not grant a special privilege to a class of persons, nor create a monopoly of the ticket business, nor abridge the privileges or immunities of citizens: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *Commonwealth v. Wilson*, 14 Phila. 384; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472. In speaking of this subject the court, in *State v. Corbett*, 57 Minn. 351, 59 N. W. 317, said that, "so far from granting any special privileges to the carrier, it imposes a burden upon him—1. By limiting his right to issue or sell tickets to agents provided with a certificate from the state of their authority; and 2. By requiring him to repurchase or redeem unused tickets." To the same effect are the words of the opinion in *Fry v. State* 63 Ind. 552, 30 Am. Rep. 244, and in *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 336, 36 N. E. 948, the court merely fortifies this position when it says, as it does, that "counsel contend, that by the terms of the act, a certain class of persons, namely, railroad ticket agents are permitted to sell tickets and are thereby granted a special privilege. We do not think there is any force in this contention. It is already disposed of by what has been said in regard to the validity of the act as an exercise of the police power of the state. The requirement that tickets shall only be sold by agents authorized so to do is merely a police regulation as to the manner in which the business of the carrier shall be conducted. From the nature of things only common carriers can in the first substance, issue or sell tickets for passage in their own conveyance or over their own lines. They have no more a monopoly of the ticket business than a manufacturer has of the articles which he manufactures. The authority to the agent is not an authority to sell tickets generally for all other carriers, but only to sell them for the particular carrier providing the certificate of authority. The act would seem to impose upon the carrier a burden and not to grant a privilege or immunity, as the repurchase of unused tickets is required, and in order to prevent frauds, the sale of tickets can only be made through agents authorized to sell in the particular mode designated by the statute": *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 337, 36 N. E. 948.

V. To Whom Statutes Apply.—Statutes declaring it unlawful for any person except the duly authorized agent of a common carrier to
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sell or deal in passenger tickets are directed against such unauthorized persons as engage in the business as a business of buying and selling passenger transportation tickets, and therefore such statutes have no application to a case where the sale of only one and a single ticket is shown: *State v. Ray*, 109 N. C. 736, 14 S. E. 83. And the sale of all special tickets, whether half fare, excursion, or tickets special in any other respect, is exempted from the operation of the provisions of such statutes: *State v. Fry*, 81 Ind. 7.

THOMAS v. STATE.

[43 Tex. Cr. Rep. 20, 62 S. W. 919.]

MURDER—Accomplice—Confession of Principal as Evidence.

On the trial of a person accused as an accomplice the confession of the principal is admissible to show the guilt of the latter and the commission of the crime, but it is not admissible to prove the guilt of the alleged accomplice. (p. 835.)

MURDER—Evidence—Charge of Court.—On the trial of an accused as an accomplice the testimony of the alleged principal that the accused advised him to kill the deceased and furnished him with a gun for that purpose, is sufficient direct evidence to justify a refusal to charge on circumstantial evidence. (p. 835.)

MURDER—Degrees of—Evidence—Instructions.—If on the trial of an accomplice, the evidence is very cogent of a killing upon express malice constituting murder in the first degree the accused cannot complain because he was given the benefit of a charge to the jury submitting to its consideration an inferior degree of murder. (p. 836.)

MURDER—Accomplice—Insufficient Verdict.—If the statute makes it mandatory that a verdict for murder specify the degree of murder of which the accused is found guilty, and that an accomplice to a crime shall be punished in the same manner as a principal, a verdict against an accomplice to murder which does not express the degree is essentially insufficient to support a verdict and judgment of conviction. (p. 836.)

A. G. Board, J. E. Butler and W. T. Young, for the appellant.

D. E. Simmons, acting assistant attorney general, for the state.

23 DAVIDSON, J. Appellant was convicted as an accomplice to the murder of Pomp Trammell—John Lindley being the principal—and his punishment assessed at twenty-five years confinement in the penitentiary.

The confessions of Lindley, the principal, were admitted in evidence over appellant's objections. In this there was no error. It was necessary, in order to secure the conviction of the ac-

complice, to prove the guilt of the principal as alleged, and any legitimate fact or circumstance which showed or tended to show the guilt of the principal was admissible in evidence for that purpose; and this is true whether or not Lindley was on trial. The guilt of the accomplice is dependent upon the guilt of the principal—that is, there can be no accomplice without a principal; and, in proving the guilt of the accomplice, it is necessary to show the guilt of the principal. So the confessions of Lindley were admissible against him as a principal, in proving that he actually did the killing. These confessions and statements of Lindley, however, were withdrawn from the consideration of the jury by the court in the charge. If upon another trial the confessions of Lindley should be used, the court should restrict the jury's consideration in regard to Lindley's guilt only as they are not facts or circumstances to prove appellant's guilt as accomplice, and can only be used against Lindley to show his guilt as principal.

The court did not err in failing to charge the law applicable to circumstantial evidence. The testimony of Lindley is positive to the fact that appellant advised and urged him to do the killing and furnishing him a gun for that purpose, and with said gun he committed the homicide. Under the unbroken line of decisions this relieves the case from being one of circumstantial evidence. Exception was reserved to the charge of the court because it submitted the theory of murder in the second degree; the contention being that, if the testimony of the state be true, it was a killing upon express malice, and therefore murder in the first degree. The evidence is very cogent, showing a cold-blooded ²⁴ killing on the part of Lindley, and the evidence against appellant is to the effect that he urged and advised Lindley to do so, and furnished the gun with which Lindley did the killing. This would have justified a verdict for the higher offense. But can defendant complain because he was given the benefit of a charge submitting the inferior degree of murder? Under the decisions of this state, this question must be answered in the negative. When the indictment charges murder, the party may be convicted of any grade of homicide, and the conviction for the lower grade of murder will not be set aside because the evidence shows the higher grade: *Baker v. State*, 4 Tex. App. 223; *Powell v. State*, 5 Tex. App. 234. This principle was expressly recognized in *Parker's Case*, 22 Tex. App. 105, 3 S. W. 100, and *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108.

The verdict is attacked because it fails to specify the degree of murder. The verdict is as follows: "We the jury find the defendant guilty as an accomplice to the murder of Pomp Trammell, as charged in the indictment, and assess his punishment at confinement in the state penitentiary for twenty-five years." Article 712 of the Penal Code provides: "If the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree he is guilty, and in either case they shall also find the punishment." Without interruption, it has been held under this statute that it is absolutely essential to the validity and sufficiency of the verdict that it specify the degree of murder of which the party is convicted. For collation of authorities, see section 1262 of White's Annotated Penal Code. It is also as well settled that the accomplice is guilty of the same offense as the principal, although it is necessary to indict him as an accomplice: See White's Annotated Penal Code, sec. 102, for collated authorities; *Carlisle v. State*, 31 Tex. Cr. Rep. 537, 21 S. W. 358. Article 81 of the Penal Code provides that "accomplices shall in all cases not otherwise expressly provided for be punished in the same manner as the principal offender." The distinction between principal offenders and accomplices consists in the facts and circumstances which connect defendant with the actual crime. The principal is guilty by reason of the fact that he commits the actual crime; as, in homicide, he does the actual killing, whereas the accomplice advises, urges, or furnishes the means to the principal for the purpose of carrying out the design or committing the offense, he not being present. The accomplice therefore is guilty of the murder, if it be a murder, by reason of the fact that he brings himself within the statutory definition of an accomplice, by furnishing the means or other acts which constitute him such. The crime is the same (that is, it is murder as much on the part of the accomplice as the principal); and, while the case must be charged which makes him an accomplice by reason of the statute, still his ultimate offense is found in the fact of killing (that is, it takes the acts as accomplice, together with the killing by the principal to justify his conviction). So under this statute the accomplice is punished in the ²⁵ same manner as the principal offender. The principal offender would be punished, in this case, if found

guilty of murder; and, of course, the verdict against the principal must specify the degree of murder. Then, if the accomplice is punished in the same manner as the principal, it is for murder, and the verdict against him must specify the degree: See authorities already cited. Because of the insufficiency of the verdict of the jury, the judgment is reversed and the cause remanded.

The Confession of a Principal felon as to his guilt is not admissible against his accessory before the fact: *Ogden v. State*, 12 Wis. 532, 78 Am. Dec. 754. In this case the principal had escaped, and it does not appear that any indictment was ever preferred against him.

SAULSBURY v. STATE.

[43 Tex. Cr. Rep. 90, 63 S. W. 568.]

INTERSTATE COMMERCE—Peddlers—Occupation Tax.—A statute by which peddlers of goods, going from place to place to sell, are required, under a penalty, to take out and pay for a license, and which makes no discrimination between residents and products of the state and those of other states, is not, as to peddlers of goods previously sent them by manufacturers in other states, void as an attempt to regulate interstate commerce. Such peddlers are engaged in internal commerce, and may be compelled to pay the license, or suffer the penalty exacted by the statute. (p. 839.)

PEDDLERS AND DRUMMERS—License Tax.—One person may be both a peddler and a drummer at the same time, and although he is a drummer as to some of the methods adopted by him in doing business, yet he is liable for a license tax imposed by the state, if as to his other methods of conducting the same business he is a peddler and not a drummer. (p. 843.)

Saunders & Saunders, for the appellant.

Banks & Cochran, for the state.

91 BROOKS, J. Appellant was convicted for pursuing the occupation of a peddler in Bell county, without first having paid the occupation tax of two hundred and fifty dollars fixed by law, and his punishment assessed at a fine of two hundred and fifty dollars.

The agreed statement of facts shows substantially the following: "Appellant admitted that neither he nor his employers, Raterman & Luth, **92** had paid the tax of two hundred and fifty dollars fixed by law upon the occupation of peddling out buggies in Texas for the year 1901; and further admitted that

he had been, during the months of March and April, 1901, engaged in peddling buggies in Bell county, Texas, and was so engaged on the second day of March, 1901, when he was arrested under the complaint filed in this cause. The following is his account of the manner in which said buggies were received and sold by him: Raterman & Luth, a partnership firm composed of H. Raterman and Theo. Luth, are buggy manufacturers living in the state of Ohio, and residents of that state. They have a factory at Cincinnati, where they manufacture buggies, hacks, and vehicles of other descriptions. In March, 1901, they shipped a carload of buggies from Cincinnati, Ohio, where their factory is located, to Temple, in Bell county, Texas, consigned to their own order. These buggies were shipped in a knocked-down condition, that is, some of them were packed as follows: The wheels were taken off the buggies and the dashboards, tongues, and shafts were detached. The wheels and dashboards were packed and bound together in the same crate with the buggies, but the tongues and shafts were shipped separately. Others were entirely taken to pieces and the different parts shipped separately; that is, the wheels, tops, springs, tongues, shafts, dashboards, axles, and bodies were separated from each other and not bound together and shipped through in that condition. The buggies were loaded in the cars in this condition at Cincinnati and shipped through to Temple in the same condition. The defendant was employed by Raterman & Luth, as their agent at Temple to sell said buggies. He and the other employes of Raterman & Luth received the buggies at Temple in their original packages in which they were shipped, unloaded them from the cars, placed them in a house rented by him, and put them together. Defendant peddled out these buggies through Bell county in the following manner: He hitched his team to a buggy and drove through the country from place to place offering the buggies for sale. Sometimes he trailed another buggy behind the one in which he was riding. His sales were made for cash, or partly for cash and partly on time. Where he sold for cash the money was remitted to Raterman & Luth, at Cincinnati. When he sold on time he took notes for the balance of the purchase money, payable to Raterman & Luth, in Cincinnati, and sent these notes to them. When sales were made of a buggy he had with him, he delivered the buggy at the time of the sale to the purchaser. If he found a person who wanted a different kind or a different priced buggy and he had one of that description in stock in

the house where he stored the buggies, he delivered it to him, the money and notes being remitted to his employer in the manner pointed out above. If he had no buggy in stock suitable to the wants of those to whom he was trying to sell, he would take his order for the kind of vehicle he wished and send it to his employers, who shipped one of that description to him, which he delivered the purchaser, remitting the money and notes in that instance as above stated. The principal sales made by him, however, ⁹³ were from the buggies he carried around and delivered at the time of sale. Neither defendant nor Raterman & Luth had any place of business in Texas. The only place they had was the house mentioned above, which was rented for a month in which to temporarily store their vehicles while they were being peddled out. Defendant had no interest in the buggies whatever, and in all the matters above mentioned acted as their agent. He stopped in one county only long enough to sell buggies on hand, when he moved to another.

Counsel for appellant in their able brief insist the conviction cannot be sustained, because the occupation tax levied on peddlers, as applied to him, is violative of what is known as "interstate commerce," and cite in support thereof the cases of *French v. State*, 42 Tex. Cr. Rep. 222, 58 S. W. 1015, *Kirkpatrick v. State*, 42 Tex. Cr. Rep. 459, 60 S. W. 762; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1; *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718. The *Kirkpatrick* case rests in the main upon the *French* case. In *French's* case, this court was endeavoring to follow the case of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681. There the court seemed to indicate that, until the property brought from another state was sold, it would still not be subject to taxation, as it would be violative of interstate commerce. At the time of the decision in the *French* and *Kirkpatrick* cases, *supra*, our attention had not been called to *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, which draws a distinction between a drummer and a peddler—a distinction that we are willing to accede to, not because the one would be any the less exempt from interstate commerce, but because to that extent it is nearer in line with our views as expressed in *Ex parte Asher*, 23 Tex. App. 662, 59 Am. Rep. 783, 5 S. W. 91. When considered abstractly, with all deference to the learned court rendering the decision, we are inclined to approve the language of Chief Justice Waite in his dissenting opinion in *Robbins v. Taxing District*, 120 U. S. 501, 7 Sup.

Ct. 598, as follows: "I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler; and yet I can hardly believe it would be contended that the provision of the same statute now in question, which fixed a license fee for all peddlers in the district, would be held to be unconstitutional in its application to peddlers who came with their goods from another state, and expected to go back." Be this as it may, we acquiesce in the decision of the supreme court of the United States, and under the authority of *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, we are constrained to overrule the cases of *French* and *Kirkpatrick*, *supra*. In the *Emert* case, the court held that the statute of a state, by which peddlers of goods going from place to place within the state to sell them are required, under a penalty, to take out and pay for license, and which makes no discrimination between residents or products of the state and those of other states, is not, as to peddlers of goods previously sent to them by manufacturers in other states, repugnant to the grant by the constitution to Congress of the power to regulate commerce⁹⁴ among the states. This decision cites with approval *Machine Company v. Gage*, 100 U. S. 676. In *Emert's* case the state of Missouri had levied an occupation tax upon all persons who should peddle certain kinds of goods, and defined a "peddler" to be one who dealt in the sale of such goods by going from place to place to sell them. Included in the class of goods designated was sewing machines. The *Singer Manufacturing Company*, a corporation of New Jersey, shipped its machines into the state of Missouri, and there delivered them to defendant, *Emert*, to be sold by him as their agent. *Emert* worked on a salary, and took the machines in a wagon, and, driving from place to place in Montgomery county, Missouri, solicited orders for their sale and offered them for sale. The evidence showed that on the day named in the information he sold and delivered to one *David Partuchek* a machine, and that he had not previously paid the occupation tax. Upon appeal, the case was affirmed by the state court: *State v. Emert*, 103 Mo. 247, 23 Am. St. Rep. 874, 15 S. W. 81. A writ of error was sued out to the supreme court of the United States. In delivering the opinion of the court, Justice Gray used the following language (*Emert v. Missouri*, 156 U. S. 306, 15 Sup. Ct. Rep. 368): "From early times in England and America there have been statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses to practice their trade."

Then he quotes with approval the decision of Chief Justice Shaw in *Commonwealth v. Ober*, 12 Cush. 493, in which defendant had been convicted of peddling without a license, and says: "In that case it was objected that the statute was repugnant to the constitution of the United States, because at variance with the exclusive right of Congress to regulate commerce with foreign nations, and among the several states and with the Indian tribes"—to which Chief Justice Shaw answered: "The law in question interferes with none of these. We consider this as wholly an internal commerce, which the states have a right to regulate, and in this respect this law stands on the same footing with the laws regulating the sales of wines and spirits, sales at auction, and very many others which are in force, and constantly acted upon." Then he quotes the following language of Justice Cooley: "That the regulation of hawkers and peddlers is important if not absolutely essential, may be taken as established by the practice of the several states. They are a class of persons who travel from place to place among strangers, and the business might easily be made a pretense or a convenience to those whose real purpose is theft or fraud. The requirement of a license gives opportunity for inquiring into antecedents and character, and the payment of a fee affords some evidence that the business is not a mere pretense." And he approves the fact that many states have statutes imposing a penalty for peddlers to follow their vocation without a license: Citing *Cowles v. Brittain*, 9 N. C. 204; *Wynne v. Wright*, 18 N. C. 19; *Tracy v. State*, 3 Mo. 3; *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12; *Machine Co. v. Cage*, 9 Baxt. 518; *State v. Richards*, ⁹⁵ 32 W. Va. 348, 9 S. E. 245; *Commonwealth v. Gardner*, 133 Pa. St. 284, 19 Am. St. Rep. 645, 19 Atl. 550. And *Emert v. Missouri*, 156 U. S. 306, 15 Sup. Ct. Rep. 368, was cited with approval by the supreme court of the United States in *Hopkins v. United States*, 171 U. S. 596, 19 Sup. Ct. Rep. 40, and *Schollenberger v. Pennsylvania*, 171 U. S. 24, 18 Sup. Ct. Rep. 757.

In 1896 this question was presented to Judge Maxey, in the United States circuit court for the western district of Texas, in *Preston v. Finley*, 72 Fed. 850. The state had imposed an occupation tax of five hundred dollars upon all persons selling or offering for sale certain illustrated papers, like the "Kansas City Sunday Sun." The publisher of the paper applied for an injunction to restrain the comptroller from the enforcement of the tax, alleging that he was a citizen of the state of

Missouri, and the tax was invalid for the reason, among others, that it was levied upon an interstate traffic in which he was engaged. Judge Maxey reviewed all of the leading cases upon the question, including *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, and held the tax was a valid exercise of the legislative authority of the state, and the question should be controlled by the principles laid down in *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367; *Machine Company v. Gage*, 100 U. S. 676, and others.

In the able brief of appellant's counsel the insistence is urged that having occasionally and incidentally sold buggies upon orders, for which he would not be liable to be taxed, as he sent his orders in to his employers, and the buggies were shipped upon said orders, he therefore would be relieved of the charge of which he was convicted, to wit, of peddling buggies. We understand the *Emert* case, *supra*, to settle this contention against appellant.

We note, in the able brief filed for the state by Banks & Cochran, among other authorities cited, the case of *State v. Sneddy*, 128 Mo. 523, 31 S. W. 36. In that case defendant was the agent of the American Harrow Company, a citizen of Michigan, and was convicted of peddling their machines without having paid an occupation tax. The harrows were shipped to defendant from Michigan to Missouri, he loaded the harrows on wagons and sent them through the country. In some instances the harrows so carried were sold outright; in others, a written order for one harrow was taken, and the harrow in the wagon immediately delivered to the purchaser; at other times a written order was taken, defendant returned to Mansfield, where he loaded another harrow, and delivered it to the party who made the order. It was contended that this constituted interstate commerce, and that the peddler's tax was void. The supreme court of Missouri used this language: "It is sufficient to say, without going over the same ground, that all of these questions were passed upon by this court in the opinion delivered by McFarland, J., in *State v. Emert*, 105 Mo. 241, 23 Am. St. Rep. 874, 15 S. W. 81, and each one of them ruled adversely to the contention of the defendant. That case has since been affirmed by the supreme court of the United States, and as the facts therein were on all-fours with the facts in this case, it is controlling authority in this case." We therefore hold that it ⁹⁶ would make no difference if appellant did occasionally take an order, send the same to his nonresident employer to be filled, and the

buggies shipped to Texas. He may be a drummer and also a peddler. The facts of this case clearly show he was a peddler under the decision in Emert's case, *supra*.

The supreme court of Maine, in *State v. Montgomery*, 92 Me. 433, 43 Atl. 13, where one was prosecuted for failing to pay a peddler's tax, held there was no doubt as to appellant's immunity from the tax, so far as the sale of the pictures was concerned, because he had previously taken the orders for these, sent them to his house to be filled, and they had been sent to him, for delivery; but when, in addition to delivering the pictures so ordered he undertook to sell, from place to place, certain frames which had also been sent to him by his house, the court below drew a distinction, and held that, under the rule laid down in the Emert case, he then became an itinerant peddler, and was subject to payment of the license tax exacted by the city: See, also, *May v. City of New Orleans*, 178 U. S. 496, 20 Sup. Ct. Rep. 976.

Since the act of 1899, peddlers of buggies have been required to pay an annual occupation tax of two hundred and fifty dollars to the state. Our statute is in all respects similar to the statute passed upon in the Emert case, *supra*, with this addition; our statute goes further and requires the collector to issue a license, without which a peddler cannot pursue his occupation. The act in reference to the license is authorized by article 5055 of the Revised Civil Statutes, as follows: "The comptroller shall cause occupation tax receipts for each occupation to be printed, with his signature for all occupations payable to the collectors, annual receipts for those that are paid annually, and quarterly receipts for all that can be paid quarterly; such receipts shall state the name of the occupation and the amount of the tax, and have blanks for the year, month, and name of license, and also have a blank space for signature of the collector; these receipts shall each have a stub attached, stating briefly the substance of the attached receipt, and shall be bound in books; and he shall forward to each collector a proper number of said receipts, and charge him with the amount represented therein, and cause him to account therefor. The collector, whenever collecting any occupation tax, shall fill the blanks in the receipt and stub by writing thereon the time for which he collects, and the name of the license, and shall sign the receipt and stub officially, and no person shall pursue any occupation unless he has a receipt, signed, as herein provided, by the comptroller and collector; and every person, firm, or corporation

keeping an office or having a local place of business shall keep posted up in a conspicuous place his or their said licenses."

Appellant was prosecuted under article 112 of our Penal Code, which provides: "Any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes due and no more than double that sum."

⁹⁷ Reverting now to the facts of this case, it will be seen that appellant had the goods shipped to him in Bell county, from his employer, in the original packages; and that the same were taken out of the original packages, and then the buggies were placed together in proper shape; and appellant then proceeded over the country, selling these buggies, without having paid the peddler's occupation tax. These facts make appellant guilty of violating the law, and are sufficient to sustain the conviction. The judgment is affirmed.

A Synopsis of the Cases of French v. State, 42 Tex. Cr. Rep. 22, 58 S. W. 1015, and of Kirkpatrick v. State, 42 Tex. Cr. Rep. 459, 60 S. W. 762, both of which were expressly overruled by the principal case, is here appended, together with an epitome of the case of Camp v. State, 42 Tex. Cr. Rep. 499, 61 S. W. 401. In the case of French v. State, 42 Tex. Cr. Rep. 222, 58 S. W. 1015, it was held that an agent for a non-resident organ company, who carries an organ with him which he sells and delivers to the purchaser directly, or in place thereof takes an order for an organ which he delivers as soon as shipped to him, from the company, or which he has shipped direct to the purchaser, receiving in payment therefor money or notes, or both, payable to the company, is engaged in interstate commerce, and not liable to an occupation tax imposed on peddlers by a state law.

In the subsequent case of Kirkpatrick v. State, 42 Tex. Cr. Rep. 459, 60 S. W. 762, it was decided on the authority of French v. State, 42 Tex. Cr. Rep. 222, 58 S. W. 1015, that an agent for a nonresident manufacturing company who sells its buggies as agent direct to the purchaser, or takes an order for a buggy to be shipped directly to the purchaser from the company, or to the order of the company and thus delivered to the purchaser by such agent who receives on payment therefor cash or notes payable to the company, is engaged in interstate commerce and exempt from the payment of an occupation tax imposed upon peddlers by the state.

On the other hand in Camp v. State, 42 Tex. Cr. Rep. 499, 61 S. W. 401, it appeared that Camp had a contract with a nonresident company manufacturing lightning-rods and equipments thereto authorizing him to take orders and make sale of such goods, the company to pay him a salary and give him in addition a margin predicated on its cata-

logue of list prices for sales and erections of its goods, he to take notes in the name of the company on sales not made for cash, but to retain his marginal interest or commission in such notes. All of the goods were shipped directly to Camp in consignments and he paid all of the freight and expenses thereon. He took orders from a number of citizens in the state and erected lightning-rods on their buildings, doing the work of erection himself, or having it done at his expense, and in a number of instances erecting such rods on buildings within so short a time after taking the order that the material therefor could not have been sent him by the manufacturer with whom he had the contract before the work was finished. Under this state of facts the court held that said Camp was not engaged in interstate commerce within the rule laid down in the principal case, but that he was a peddler and independent dealer in lightning-rods, and liable to pay the occupation tax imposed upon such peddler by the state. In delivering its opinion the court said: "As we construe this agreement or contract, it was evidently intended that appellant should carry on the business of dealing in lightning-rods and erecting them on the houses of all persons with whom he could make contracts. He was to do the work of carrying the lightning-rods from place to place and set them up at his own expense, and was to share in the profits arising, only accounting to the foreign concern for one-fourth of their list price for such goods; and all the balance over this was to go to appellant. If this arrangement did not constitute appellant an independent dealer in the lightning-rod business, then it certainly constituted him a partner with the foreign house, he at the time residing and doing a lightning-rod business in this state. It looks to us very much as if the arrangement was concocted and entered into for the purpose of evading the occupation tax, which applies indiscriminately to all persons engaged in dealing in lightning-rods within this state. We do not believe appellant was engaged in interstate commerce, or that the rules of law applicable thereto will protect him against the payment of the tax."

Notwithstanding the principal case overruled pre-existing decisions in the same state, professedly for the purpose of conforming the decisions in Texas to those of the supreme court of the United States, we think it very doubtful whether the decisions thus overruled are not reconcilable to, and in harmony with, the latest adjudications of the supreme court of the United States on the same subject. Since the decision in the principal case, similar question has been twice presented to the supreme court of Georgia. In *Stone v. State*, 117 Ga. 292, 43 S. E. 740, it appeared that the plaintiff in error had been tried and convicted of being a peddler or itinerant trader, in this, that he sold goods, wares, and merchandise, to wit, clocks without a license from the proper authorities. He was a resident of Alabama, acting as a traveling salesman for the L. B. Price Mercantile Company, chartered under the laws of Tennessee and having its place

of business in the city of Chattanooga. As such salesman he traveled for his principal, taking orders for the various goods handled by it. These orders were then sent to the principal at Chattanooga, where the goods were. If it approved the sales or orders, the goods were boxed up and shipped to Stone in one package, and he, on receiving them, delivered them to the parties who had given him orders. He at no time carried any goods with him, and the sales were made at residences. Under the decisions of the courts of Georgia, he was declared to be a peddler, but it was said that the controlling question was whether the business carried on by him came within the interstate commerce clause of the federal constitution. The supreme court held that under the decision of *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 229, the conviction could not be sustained.

In *Kehrer v. Stewart*, 117 Ga. 960, 44 S. E. 854 the action was brought to recover a sum exacted by the defendant as a county tax collector under a statute purporting to impose a specific tax upon all agents of packing-houses doing business within the state, and making penal the pursuit of such an occupation by anyone who had not paid such tax. Kehrer, before the passage of the statute, had entered into a contract of employment with Nelson Morris & Co., under which, for a stipulated sum per week, he was to render services as chief clerk and manager of their business in Atlanta, Georgia. They were a partnership composed of citizens of Illinois, maintaining there a packing-house, where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes was carried on. They did not carry on such business at any place in Georgia, but had a place of business in Atlanta, where, at wholesale, they sold fresh, cured, and salt meats and other products that had been manufactured from the carcasses of slaughtered animals. It was held that this act was unconstitutional to the extent that it sought to tax interstate commerce, but was constitutional so far as it applied to domestic business, and that, as Kehrer did a domestic, in addition to an interstate, business, he was subject to the tax, and hence could not recover the amount collected of him. The conflicting decisions upon the subject doubtless result from the difficulty of understanding the decisions of the national courts. In *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 228, it appeared that an ordinance had been enacted in the city of Greensboro, in that state, declaring that every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face in the city of Greensboro, whether an order therefor had been previously taken or not, unless the business was carried on by the same person in connection with some other business for which a license had already been paid by him, should pay a license tax of ten dollars for each year, and that anyone engaging in the business without having paid such tax should be fined twenty dollars, and that each sale or delivery should constitute a distinct and separate offense. *Caldwell* was an employé

of the Chicago Portrait Company, which did business in Illinois, and he came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employes of the Chicago Portrait Company who had preceded him in Greensboro. He went to the railway freight station and took therefrom large packages of pictures and frames, which had been received there addressed to the Chicago Portrait Company. These packages he carried to his rooms in a hotel in the city of Greensboro, where he broke the bulk, placing the pictures in their proper frames, and then delivering them one at a time to the respective purchasers. He was convicted and sentenced to pay a fine of twenty dollars and the costs of the action, and such conviction was sustained by the supreme court of the state. Its action was reversed on writ of error. The opinion was delivered by Mr. Justice Shiras, and is as follows:

"It might fairly be contended that, upon the facts found by the special verdict, the defendant was not guilty of engaging in the business of delivering pictures without a license, within the purview of the ordinance in question. But as the supreme court of North Carolina has held otherwise, we must accept that conclusion as a question of construction belonging to that court. Our task is to determine whether the ordinance, as so construed, is invalid as an attempt to interfere with and to regulate interstate commerce, and can be speedily performed, for we think the case falls within previous decisions of this court on this subject.

"Such decisions are numerous, but we do not deem it necessary to refer to but a few of them.

"The subject was elaborately considered in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 1 Int. Com. Rep. 45, 7 Sup. Ct. Rep. 592. The case was brought here on a writ of error to the supreme court of Tennessee, which had held valid a statute of that state, by which it was enacted that 'all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of ten dollars per week or twenty-five dollars per month for such privilege, and no license shall be issued for a longer period than three months.' *Robbins*, the plaintiff in error, was a citizen and a resident of the city of Cincinnati, Ohio, and was convicted of having offered for sale articles of merchandise belonging to a firm in Cincinnati without having procured a license. In his discussion of the case Mr. Justice Bradley stated the following principles, as already established by this court: The constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that where the power of Congress to regulate is exclusive, the failure of

Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, health, and comfort of persons and the protection of property, and imposes taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States; and imposes taxes upon all property within the state, mingled with and forming part of the great mass of property therein; but that, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not become part of the common mass of property therein; and no discrimination can be made, by such regulations adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce.

“Upon these established principles the conclusion was reached that the state statute in question was invalid, and the following observations are pertinent to the question before us:

“‘It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples, whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true, but so it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon in-

terstate commerce for the benefit and protection of its own citizens we are brought back to the condition of things which existed before the adoption of the constitution, and which was one of the principal causes that led to it. If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation.'

"*Asher v. Texas*, 128 U. S. 129, 2 Int. Com. Rep. 241, 9 Sup. Ct. Rep. 1, was a case where a state statute required from 'every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax,' and such legislation was declared inoperative, so far as it affected one soliciting orders for a business house in another state. The same doctrine was held in *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. Rep. 256, in the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license as required by an act of the legislative assembly of the District of Columbia.

"In *Lyng v. Michigan*, 135 U. S. 161, 3 Int. Com. Rep. 143, 10 Sup. Ct. Rep. 725, the general proposition was repeated: 'We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'

"In *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851, an act of the state of Kentucky which forbade the agent of an express company, not incorporated by the laws of that state, from carrying on business without first obtaining a license from the state, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, said: 'The character of police regulation claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate, any more than upon for-

eign, commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void.'

"In *Brennan v. Titusville*, 153 U. S. 289, 4 Int. Com. Rep. 658, 14 Sup. Ct. Rep. 829, was again presented the question of the validity of an ordinance providing 'that all persons canvassing or soliciting, within said city [of Titusville], orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited shall be required to procure from the mayor a license to transact said business, and shall pay the said treasurer therefor the following sums, according to the time for which said licenses shall be granted,' and also prescribing a penalty for failing to procure such license. An agreed statement of facts showed that Shepard was a manufacturer of picture frames and maker of portraits, residing in Chicago in the state of Illinois, of which state he was a citizen, and in which state he had his manufactory and place of business; that in the prosecution of his business he employed agents, who under his directions, solicited orders for pictures and picture frames in the state of Pennsylvania and in other states of the Union, by going personally to residents and citizens of said state of Pennsylvania and other states, and exhibiting samples of his pictures and frames, going, when necessary, from house to house; that Brennan was an agent of the said Shepard, employed by him to travel and solicit orders for pictures and frames, upon a salary; that upon receiving orders for pictures and picture frames, the agents of Shepard forwarded the same to him at Chicago, where the goods were made, and from there shipped to the purchasers in Titusville by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shepard at Chicago; that Brennan, the agent employed by Shepard, was engaged in conducting the business in the manner stated, at the time of his arrest, and acting solely for Shepard.

"Upon such a state of facts, and upon a review of the cases, this court held it was not bound by the decision of the highest court of the state in which such a tax was authorized and imposed that such a tax was an exercise of the police power, and not of the taxing power; and that the ordinance in question imposed a tax upon interstate commerce, and was therefore void. To the argument that no discrimination was made in the ordinance between domestic and foreign drummers, the court said: 'It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the pur-

pose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods in London or New York, because, in the one case it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone': *Robbing v. Shelby County Taxing Dist.*, 120 U. S. 497, 1 Int. Com. Rep. 48, 7 Sup. Ct. Rep. 596.

"The last case we shall cite is the recent one of *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. Rep. 576, where was considered the validity of a statute of the state of Tennessee providing for the collection of a privilege tax on the occupation of merchandise brokers. By agreement of the parties two questions only were argued in the state court: 1. Whether or not the complainants, who had filed a bill to restrain the collection of the tax, were merchandise brokers and subject by the statute to tax as such; 2. Whether or not their business constituted interstate commerce, and therefore was beyond the reach of the state's taxing power. The state supreme court held that the complainants, as merchandise brokers, were within the meaning of the statute, and that the tax was a valid one under the constitution of the United States.

"This court, though recognizing that it was obliged to accept the construction put upon the statute by the state court, reversed the judgment of that court in respect to the nature of the commerce as interstate. In the opinion of the court, delivered by Mr. Justice Peckham, the principal cases, beginning with *Brown v. Maryland*, 12 Wheat. 419, and ending with *Brennan v. Titusville*, 153 U. S. 289, 4 Int. Com. Rep. 658, 14 Sup. Ct. Rep. 829, were again reviewed, and the conclusions there reached were affirmed.

"The state supreme court endeavored to distinguish the present case from that of *Brennan v. Titusville*, in the following observations: 'The defendant insists that *Brennan v. Titusville*, 153 U. S. 289, 4 Int. Com. Rep. 658, 14 Sup. Ct. Rep. 829, is directly in point—is, in every essential fact, this case—and should control the opinion of the court on this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case, the goods were shipped directly to the purchaser. In this case, they were shipped by the Chicago company to itself in the city of Greensboro; and when they reached Greensboro, the defendant, as the agent of the Chicago company received them from the railroad at its depot, carried them to its room in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of *Brennan v. Titusville*, and we should hold, as it was held there, that it was in-

terference with interstate commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract, and no title passed by this contract. . . . If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago, the railroad being deemed to be the agent of the consignee, . . . and *Brennan v. Titusville* would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to itself (the Chicago Portrait Company) in Greensboro. This being so, no title ever passed from the Chicago Portrait Company, until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, Could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax, for which its own citizens would be liable? It seems to us that it could not.' -

"We are not persuaded by this reasoning. It seems to proceed upon two propositions: 1. That the pictures in question were not completed before they were brought to Greensboro; and 2. That the articles were not shipped directly to the purchasers, but to an agent of the senders in Greensboro.

"But it certainly cannot be pretended that if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the state, or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question be interstate commerce beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax.

"But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and 'placing the pictures in their proper places' (the language of the verdict), meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent

of the vendor at Greensboro, who delivered them to the purchasers, deprived the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

“Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the constitution.

“It cannot escape observation that efforts to control commerce of this kind, in the interest of the states where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation.

“Upon principle and authority, therefore, we conclude that the judgment of the supreme court of North Carolina should be and is reversed, and the cause is remanded to that court to take further proceedings not inconsistent with this opinion.”

License Taxes imposed upon persons engaged in selling goods are discussed, in respect to their validity under the commerce clause of the federal constitution, in the monographic note to *People v. Wemple*, 27 Am. St. Rep. 561-563; *State v. Willingham*, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, and cases cited in the cross-reference note thereto. As to who is a peddler within the meaning of license laws, see *St. Paul v. Briggs*, 85 Minn. 290, 88 N. W. 984, 89 Am. St. Rep. 554, and cases cited in the cross-reference note thereto; *State v. Frank*, 130 N. C. 724, 41 S. E. 785, 89 Am. St. Rep. 885, and cases cited in the cross-reference note thereto.

COOK v. STATE.

[43 Tex. Cr. Rep. 182, 63 S. W. 872.]

MURDER—Former Jeopardy—Question for Jury.—If, on a plea of former jeopardy, it is shown that there were two acts constituting but one contemporaneous transaction, one intent and one volition on the part of the accused, though two persons may have been assaulted or killed in such single transaction, an acquittal for one of the acts is a bar to a prosecution for the other. In such case the question whether such acts constituted one transaction, one intent, and one volition, is a question of fact for the jury, and it is error to strike out the plea of former jeopardy without submitting it to the jury. (p. 888.)

CRIMINAL LAW—Self-defense.—The right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act, unheralded and unaccompanied by any demonstration, verbal or otherwise, indicative of the wrongful purpose. (p. 888.)

MURDER—Self-defense—Provoking Difficulty.—If self-defense is set up against a charge of murder, it is error to instruct the jury upon the law of "provoking the difficulty," when there is no evidence of provocation. (p. 888.)

Martin & Martin, for the appellant.

J. C. Wilson, Stevenson & Ritcher and R. A. John, assistant attorney general, for the state.

¹⁸⁴ BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at ten years' confinement in the penitentiary.

At the April term of the district court of Parker county, the grand jury returned an indictment against appellant, charging him with having murdered deceased, T. G. Hargrove, by shooting him with a pistol. The same grand jury also returned another indictment against appellant, charging him with the offense of an assault with intent to murder George Goodman, alleging that said assault was committed on the fifth day of February, 1901. On the twenty-seventh day of April, 1901, appellant was ¹⁸⁵ duly and legally tried for the last-named offense in the district court of Parker county, and was acquitted by the jury. When this case was called for trial on May 13, 1901, appellant filed a plea in bar to this prosecution, in substance as follows: A plea of former acquittal. Said plea, after setting out the indictment, verdict of the jury, and judgment of the court, acquitting defendant of assault with intent to murder upon George Goodman at one and the same time the murder in this case is alleged to have been committed, proceeded as follows: "And the

said B. W. Cook in fact saith that he, the said B. W. Cook, and the said B. W. Cook so accused and acquitted as last aforesaid, are one and the same person, and not other and different persons, and that the offense of which he, the said B. W. Cook, was so acquitted as aforesaid, and the offense charged against him in the indictment herein, and for which he is now being prosecuted, is one and the same transaction, offense, act, and volition, and not other and different transactions, offenses, acts, and volitions; and this he, the said B. W. Cook, is ready to verify." Upon motion of the county attorney, this plea was struck out. Appellant's counsel strenuously insist that this plea submits a question of fact upon which the court should have heard evidence, and, having so done, should have charged the jury with reference to said plea. The following is a statement of the facts taken from appellant's brief, which we find, from an inspection of the transcript, to be substantially all the evidence of the eyewitnesses introduced: "There were four eyewitnesses to the difficulty, besides the participants (Tom Tarkington, Miss Julia Gilbert, Mrs. W. T. Bowman, and Valton Cook), each of whom testified that appellant did not pull his pistol from his pocket until after George Goodman had struck appellant on or about the head and nearly knocked him down. Each of them testified that appellant had not said a word to George Goodman when he (appellant) pulled his pistol and fired the same at George Goodman. Each of them testified that appellant was walking along the sidewalk, and was in the act of or had just passed the said George Goodman, who was standing on the sidewalk, when he (Goodman) hit appellant on the head, nearly knocking him down. All of said witnesses testified that, as soon as appellant straightened up after Goodman had hit him, he (appellant) pulled his pistol from his pocket, while he was in the act of straightening himself, or recovering from the blow. The only witness who testified that the difficulty occurred or was begun in a different way was the said George Goodman. We will here give his exact testimony on this subject, in full, to wit: 'I was standing out on the sidewalk in front of the store when the defendant and his son came along. I saw them about the time they got to Mr. Ellington's store. I stayed on the sidewalk and watched them until they had gotten to me, or probably had passed me a little, when the defendant suddenly pulled out his pistol, started to make an effort to shoot, but before he had time to do so I struck him on the head with my fist. I hit him a glancing lick. Did not hit very hard, for the reason

that the lick glanced. As soon ¹⁸⁶ as I hit, defendant shot at me. When Cook came up in front of Hargrove's store, he came up in a stooping position, and had his hat pulled down over his eyes. I hit him because he was pulling his pistol, as I thought he was going to shoot me. I was not mad or excited when I hit him. I was not expecting him to have any difficulty with me until he pulled his pistol. He did not say a word to me, or me to him. . . . I do not know why I was standing out there on the sidewalk when defendant came along. I did not expect any trouble with him. If I had, I would not have stood there until he came up where I was. I did not notice his hands in his pockets. He did not say a word to me, or me to him.' The undisputed evidence showed that the sidewalk where the difficulty occurred was a public sidewalk, and that appellant usually and almost daily traveled it in going to and from his place of business, and that at the time of the difficulty he was on his way home. The state proved that, on the morning preceding the difficulty, appellant was seen in his shoeshop oiling and snapping his pistol; that appellant had told three or four parties during the day that, if George Goodman did not let him alone, he would hurt or kill him. R. B. Milliken and appellant testified that George Goodman had been to appellant's shop during the afternoon, and told appellant while there that, if he (appellant) ever came across on the north side of town again, he would whip hell out of him and his son. Tom Tarkington also testified that Goodman told him during the day that he was going to whip hell out of the appellant when he came along the sidewalk, going home." It appears furthermore, in addition to the above statement, that appellant fired two shots in rapid succession, one of which struck deceased, Hargrove. As stated above, appellant was tried for assault with intent to murder upon Goodman, and found not guilty.

We think appellant is correct in insisting that the court erred in striking out his plea of former acquittal, since, as he insists, the same presents a question of fact, and not a question of law, which fact could not be ascertained by the court, except upon hearing the evidence. We have held that the rule in reference to pleas of this character is that if the plea shows upon its face that they are different transactions, independent of and not connected with each other, then it is proper for the court to sustain the motion to strike out said plea. But, if the plea presents a question of fact, then it is a question for the jury, and not for the court. In other words, the rule to be deduced

from the authorities is that, where the offenses charged in different indictments are so diverse as not to admit of proof that they are the same, the court may decide the issue without submitting it to the jury: *Wheelock v. State* (Tex. Cr. App.), 38 S. W. 182; *Wilson v. State*, 45 Tex. 77, 23 Am. Rep. 602; *Wright v. State*, 37 Tex. Cr. Rep. 627, 40 S. W. 492. Appellant, in his able brief, cites us to the cases of *Augustine v. State*, 41 Tex. Cr. Rep. 59, ante, page 765, 52 S. W. 77, and *Taylor v. State*, 41 Tex. Cr. Rep. 564, 55 S. W. 961. But an inspection of these cases will show that they are separate acts, ¹⁸⁷ or, in other words, separate volitions, although they occurred contemporaneously.

Reverting to the foregoing facts, the matter for our disposition stands in this light: Appellant in the previous case was tried for shooting at George Goodman with the intent to commit the offense of assault with intent to murder. The evidence shows that two shots were fired. According to the evidence of the defense, both of these shots were fired at Goodman. According to the evidence of the state, one of the shots was fired at the deceased, Hargrove. Then it becomes a question of fact, and the court should have admitted the evidence under defendant's plea, and then have charged the jury that if they believed from the evidence, beyond a reasonable doubt, that defendant shot at deceased, and not at Goodman, then they would find against appellant's plea of former acquittal, and proceed to consider whether or not defendant was guilty of any offense under other portions of the charge. In other words, we understand the authorities to hold that if defendant did not shoot at deceased, but shot at Goodman, it matters not what his intent may have been in shooting at the said Goodman; that, when he is tried upon an indictment and found not guilty in a court of competent jurisdiction, this is jeopardy within the contemplation of the constitution, and he cannot be again tried for said offense. In *Kelly v. State*, 43 Tex. Cr. Rep. 40, 62 S. W. 915, the evidence showed that appellant killed two brothers in the same difficulty. He pleaded former acquittal of killing one in the trial for killing the other. We held the plea could not be sustained by the evidence, because it showed it was not one act or volition on the part of appellant. In other words, there were two shots, two separate and distinct intentions, two acts, two volitions, contemporaneous. But where there is one act, one intent, one volition, as is evidenced by the testimony

of appellant in this case, then appellant cannot be convicted upon an act, intent, and volition for which he has been previously acquitted. This is sustained by a long line of authorities, and, without discussing them in detail, we will only comment on a few. In *State v. Colgate*, 31 Kan. 511, 3 Pac. 346, 47 Am. Rep. 507, defendant was indicted and acquitted of burning a mill. In subsequent prosecution for setting fire to and burning the books of account contained in said mill, he pleaded former acquittal. The court, in a very learned opinion, after reviewing a great many of the authorities, held that the plea ought to have been sustained. It appears that under the statutes of Kansas the burning of any character of personal property is a species of burglary. In *Woodford v. People*, 62 N. Y. 118, 20 Am. Rep. 464, it was held that where a party is being prosecuted for arson, in setting fire to one house, and various other houses are burned by virtue of said act of arson, the burning of the various houses, one after the other, would not make a separate and distinct offense, there being but one act of volition. The court, in another part of last cited case, said: "It follows that two or more persons may be assaulted or killed by a single act, or two or more buildings burned by 188 a single act; and in such case it seems clear that the offense may be regarded as single. This accords with reason. The rule can work no injustice to the party accused": See, also, *Sadberry v. State*, 39 Tex. Cr. Rep. 466, 46 S. W. 639; *Jones v. State*, 66 Miss. 380, 14 Am. St. Rep. 570, 6 South. 231; *Benn v. State*, 26 Ala. 9; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369; *Hurst v. State*, 86 Ala. 604, 11 Am. St. Rep. 79, 6 South. 120; *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17, 20 South. 632; *People v. Stevens*, 79 Cal. 428, 21 Pac. 856; *State Elder*, 65 Ind. 282, 32 Am. Rep. 69; *Trippett v. Commonwealth*, 84 Ky. 193, 1 S. W. 94; *State v. Matthews*, 42 Vt. 542. The *Gunter* case is exactly like the present one.

Appellant's second assignment is, that the court erred in charging the jury upon the law of provoking the difficulty. We think this assignment is well taken. In *Cartwright v. State*, 14 Tex. App. 486, we held that the right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act unheralded and unaccompanied by any demonstration, verbal or otherwise, indicative of the wrongful purpose. And, with unvarying uniformity, we have upheld this principle as stated in the *Cartwright* case. In *Casner v. State*, 43 Tex. Cr. Rep. 12, 62 S. W. 914, 2 Tex. Cr. Rep. 559, we held that

the mere fact that appellant made an assault is not provoking the difficulty within the contemplation of the law. The witness, George Goodman, as indicated by the above statement, says: "I was standing out on the sidewalk in front of the store, when defendant and his son came along. I saw them about the time they got to Mr. Ellington's store. I stayed on the sidewalk and watched them until they had gotten to me, or probably had passed me a little, when defendant suddenly pulled out his pistol, started to make an effort to shoot, but, before he had time to do so, I struck him on the head with my fist." Now, there is nothing in this statement to suggest provoking the difficulty. If Goodman's statement be true, appellant was in the act of making an unprovoked assault upon him at the time he knocked him down to save his own life or his person from serious bodily harm. We attempted in the Casner case, *supra*, to define the word "provoke." The Penal Code says that all words must be taken in their ordinary significance, unless technical words are used. Then the dictionaries define the word to mean to excite to anger, or passion, to exasperate, to irritate, to enrage. Now, what did appellant do to Goodman to excite him to anger, to passion, to exasperate, to irritate, or enrage him? He was going along the street, as he had a right to do. He had partially passed Goodman, or was in the act of doing so, when Goodman says he drew a pistol, or was in the act of drawing one, when he knocked him down. What act was done by appellant, or what word was spoken by him, indicative of any desire or inclination to bring about and provoke a difficulty? There is nothing in the Casner case, *supra*, at variance with any of the decisions of this court on the question of provoking the difficulty. The judge must charge the jury all the law applicable to the facts; and a charge on the law of provoking the difficulty, when there is no provocation, is as serious an error against the rights of appellant as to omit charging one of his defenses. The district attorney, who files a brief, insists that the last-cited case is at ¹⁸⁹ variance with the other decisions. This is not true. For a fuller and further discussion of this question, see *White v. State* (Tex. Cr. App.), 32 S. W. 575; *Wrage v. State*, 41 Tex. Cr. Rep. 369, 54 S. W. 603; *Airhart v. State*, 40 Tex. Cr. Rep. 470, 76 Am. St. Rep. 736, 51 S. W. 214; *Mozee v. State* (Tex. Cr. App.), 51 S. W. 250; *Abram v. State*, 36 Tex. Cr. Rep. 44, 35 S. W. 389.

For the errors discussed, the judgment is reversed and the cause remanded.

The Plea of Former Jeopardy, when there is an assault or killing of several in one transaction, is considered in the monographic note to *People v. McDaniels*, 92 Am. St. Rep. 120, 121; *Augustine v. State*, 41 Tex. Cr. Rep. 59, ante, p. 765, 52 S. W. 77.

The Right of Self-defense as affected by the fact that the person asserting it provokes the difficulty is discussed in the monographic note to *State v. Sumner*, 74 Am. St. Rep. 731-735. If he seeks the difficulty with the deceased for the purpose of beating or chastising him, and in pursuance thereof arms himself with a pistol to be used in case of necessity, and with it kills the deceased, the killing is murder, although it was necessary to use the weapon in defense: *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96, 8 South. 98. See, too, *State v. Cobb*, 65 S. C. 324, 95 Am. St. Rep. 801, 43 S. E. 654.

OGLE v. STATE.

[43 Tex. Cr. Rep. 219, 63 S. W. 1009.]

FORMER JEOPARDY—Jurisdiction—Void Indictment.—Jurisdiction of the court trying the case is an essential prerequisite to a plea of once in jeopardy, and if the indictment under which the trial is had is void, the court acquires no jurisdiction. (p. 862.)

FORMER JEOPARDY—Void Indictment.—An acquittal or conviction obtained upon a void proceeding or indictment is not a bar to a subsequent indictment and prosecution for the same crime. (p. 864.)

FORMER JEOPARDY—Void Indictment—Illegal Grand Jury. Under a constitution, expressly providing that a grand jury shall consist of twelve men, an indictment found by such jury composed of more or less than twelve men is utterly void and not the basis of jurisdiction, nor, after trial thereunder, of a plea of former conviction or acquittal. (p. 867.)

FORMER JEOPARDY—Void Indictment—Jurisdiction by Consent.—Consent cannot confer jurisdiction to try an accused for a crime under a void indictment, so as to make the judgment in such case the basis for a plea of former jeopardy, or in bar of a subsequent prosecution under a valid indictment for the same offense. (p. 869.)

CRIMINAL LAW—Imprisonment under Void Indictment—Credit for Time Served.—An accused convicted and sentenced under a void indictment and subsequently released upon habeas corpus, is not, upon his conviction and sentence under a subsequent valid indictment for the same crime, entitled to a credit upon his second term for the time served by him under such void conviction. (p. 869.)

Ivy & Scruggs, A. W. Cunningham and J. P. Wood, for the appellant.

Wear, Morrow & Smithdeal, D. Derden, B. Y. Cummings, C. P. Greenwood, county attorney, and R. A. John, assistant attorney general, for the state.

226 DAVIDSON, P. J. In 1883 appellant was convicted in Hill county of murder in the second degree, and his punishment assessed at ninety-nine years in the penitentiary. On appeal that judgment was affirmed. During our recent Dallas term application was made in his behalf for the writ of habeas corpus, on the ground that the conviction was void, and the court trying him had no jurisdiction because the indictment was presented by a grand jury consisting of thirteen men. On the hearing of the writ appellant was discharged from the penalty of the former conviction. On April 27, 1901, a new indictment was preferred by a grand jury of Hill county. Upon this trial appellant was again convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary. The latter indictment was in the usual form, and charged murder in the first as well as the second degree. Appellant pleaded in bar of murder in the first degree his acquittal of that degree under the former indictment, and his conviction of murder in the second degree, which, he says, is also a bar to a prosecution for murder in the first degree in this case. He also pleaded conviction for murder in the second degree in bar of his trial for that offense under the present indictment, and further, if the second plea was not well taken, then, under his previous conviction for ninety-nine years, he had served something over seventeen years of that time before being discharged, and asked, in case of his conviction for murder in the second degree under this indictment, **227** that he be allowed that seventeen years as a credit on whatever punishment the jury might assess in this case. The court sustained the demurrer to that portion of the plea which claimed a credit for the time served in the penitentiary under the previous conviction. The state replied to the pleas in bar, that the prior indictment was absolutely void; that the district court of Hill county acquired no jurisdiction, and therefore the judgment was void. Appellant relies on *Mixon's case*, 35 Tex. Cr. Rep. 458, 34 S. W. 290, in support of his plea of former acquittal of murder in the first degree. The case is not in point. In that case the question of jurisdiction was not an issue. The indictment, though defective on its face, was returned by a legal grand jury. The jurisdiction of the court was not questioned. That

case simply holds that an acquittal under an indictment defective on its face as to averments will support the plea setting up that defense under the theory that it was an irregularity provided for by our statute and Bill of Rights. The particular clause of the Bill of Rights referred to provides: "Nor shall a person be again put upon trial for the same offense after verdict of not guilty in a court of competent jurisdiction": Bill of Rights, art. 1, sec. 14. Before a verdict of not guilty can be obtained, there must be a court of competent jurisdiction to try the case, and its jurisdiction must legally attach in order to authorize a trial. The jurisdiction in *Mixon's case* had attached, but, the first indictment being defective, a new trial was awarded. On the subsequent trial, acquittal was pleaded in bar of those degrees of homicide of which the accused was acquitted on the first trial. This was ignored by the trial court, and on appeal held error. But this is not the question here presented. In that case there was jurisdiction. In this case there was not. The *Mixon case* has reference to voidable judgments. This case presents the issues of the effect of a void judgment—one rendered by a court without jurisdiction of the cause it sought to try. We deem it unnecessary to enter into a discussion of judgments or proceedings which are voidable. That question is not involved here. The prior judgment in this case is not voidable, but void, and was set aside by this court by the procurement of appellant. Now, is the first indictment in this case void? The facts show it is, for it was returned by a grand jury composed of thirteen men. If void, then its presentment did not attach the jurisdiction of the district court of Hill county: *Lott v. State*, 18 Tex. App. 627; *McNeese v. State*, 19 Tex. App. 49; *Smith v. State*, 19 Tex. App. 95; *Ex parte Swain*, 19 Tex. App. 323; *Rainey v. State*, 19 Tex. App. 479; *Wells v. State*, 21 Tex. App. 596; *Kennedy v. State*, 22 Tex. App. 693, 3 S. W. 480; *Mays v. State*, 36 Tex. Cr. Rep. 437, 37 S. W. 721; *Ex parte Ogle* (Dallas term, 1901), 61 S. W. 122. So far as we are aware, jurisdiction of the court trying the cause is an essential prerequisite where jeopardy is pleaded. "No matter how far the proceedings may go, there is no jeopardy, unless the court has jurisdiction to try the offense": ²²⁸ 17 Am. & Eng. Ency. of Law, 586, 587; *Wemyss v. Hopkins*, L. R. 10 Q. B. 378; *Ex parte Lange*, 18 Wall. 163; *United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. Rep. 1192; *Nicholson v. State*, 72 Ala. 176; *Bradley v. State*, 32 Ark. 722; *State v. Nichols*, 38 Ark. 550; *State v. Cheek*,

25 Ark. 206; *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213, 2 S. W. 191; *Harp v. State*, 59 Ark. 113, 26 S. W. 714. The same rule is laid down in California, Colorado, Georgia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Vermont, Virginia, Washington, and West Virginia. For collation of authorities from these states, see 17 Am. & Eng. Ency. of Law, 587, note 1. The same rule obtains in this state: 17 Am. & Eng. Ency. of Law, 587, note 1. "Where the grand jury finding the indictment is illegally organized, . . . the indictment is invalid, and consequently a trial based on it will not bar a subsequent prosecution for the same offense": 17 Am. & Eng. Ency. of Law, 588; *Finley v. State*, 61 Ala. 201; *Weston v. State*, 63 Ala. 155; *Brown v. State*, 10 Ark. 607; *Joy v. State*, 14 Ind. 139; *Kohlheimer v. State*, 39 Miss. 548. Speaking of the same subject, Mr. Bishop says: "When the grand jury is organized so imperfectly as not to be a lawful body, there is no valid indictment, therefore no jeopardy": *Bishop's Criminal Law*, sec. 1021, citing *Kohlheimer v. State*, 39 Miss. 548; *Finley v. State*, 61 Ala. 201; *Weston v. State*, 63 Ala. 155. *Kohlheimer v. State*, 39 Miss. 548, is directly in point. The substance of that opinion is: "Where the indictment under which a party has been tried and convicted or acquitted is void on the face of the record, because of the illegal organization of the grand jury who found and returned it, such acquittal or conviction is not, either by the common law or the statute of this state, a bar to a subsequent prosecution for the same offense. It is otherwise where the indictment is merely voidable for matter dehors the record." In that case appellant had been tried under an indictment returned by an illegal grand jury, which sought to charge murder, but had been acquitted of the murder and found guilty of manslaughter. This acquittal was set up in bar of murder upon a second trial under a good indictment. Speaking of the constitutional inhibition that no person for the same offense shall be twice put in jeopardy of life and liberty, the court said: "The same provision is contained in the constitution of the United States, and the constitutions of most, if not all, the states; and the decisions of the courts have constantly recognized the principle, under their written constitutions, so fully established by the common law, that, 'if the indictment be so defective in form that a valid judgment could not be pronounced upon it against the defendant, he has not been in jeopardy, and, if acquitted, the acquittal

would be no bar to another prosecution for the same offense.' [Citing many authorities.] It is further said by Mr. Bishop, upon the authority of many adjudged cases, 'that, if sentence be pronounced upon conviction, the defendant will be protected, while the judgment remains unreversed, not because he has ever been in jeopardy, but because of ²²⁹ a general and very important principle of law, that an erroneous final judgment, rendered by a competent tribunal having jurisdiction over the subject matter, is voidable only,' etc. But he further says in this connection: 'Where a man is brought before a tribunal that has no jurisdiction over the offense with which he is charged, or that has its existence by virtue of an unconstitutional act of the legislature, or that is holding a term of court unauthorized by law, or that for any other reason has no authority to try him, he is not in jeopardy, however far such tribunal may proceed with the case. And in most, and probably all, of these circumstances the final judgment, when pronounced, is not "voidable," as mentioned in a previous section, but void, so that his conviction, unreversed, is no more a bar to another prosecution than his acquittal.' [That court cites many authorities in support of this proposition.] Mr. Wharton, in his American Criminal Law, section 541, says: 'A legal acquittal in any court of competent jurisdiction, if the indictment be good, will be sufficient to preclude any subsequent proceedings before every other court.' " The court then makes this general proposition: "It seems to be clear, therefore, upon principle as well as authority, that neither at common law nor by our constitution will an acquittal or conviction (where the penalty has not been inflicted) upon a void proceeding or indictment operate as a bar to a subsequent indictment for the same offense. It cannot, therefore, be said that the defendant has been acquitted of the crime of murder by his conviction of manslaughter upon an indictment which is pronounced in this proceeding to be void because not found by a competent grand jury, as appears by this record," etc.: *Kohlheimer v. State*, 39 Miss. 548.

Our Bill of Rights, article 1, section 14, provides: "No person for the same offense shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." Article 5, section 13, of the constitution requires: "Grand and petit juries in the district court shall be composed of twelve men." When there are more than twelve men, what effect has it upon the indictment and the jurisdic-

tion of the court? As far back as Lott's Case, 18 Tex. App. 627, a grand jury composed of more than twelve members has been held illegal, its acts nullities, and the indictment preferred by such grand jury void, and could not form the basis of a prosecution. In that case we find the following language: "We see from these provisions that a citizen can only be convicted and punished for a felony by the due course of the law of the land, and by authority of the indictment of a grand jury. The district court can only acquire jurisdiction to hear and determine a felony case by an indictment of a grand jury. It has no more authority to hear and determine a felony case without an indictment of a grand jury thus presented than would a justice of the peace. No court in this state has such jurisdiction and authority. What constitutes a grand jury? Our constitution answers the question plainly and emphatically. It says, 'Grand and petit juries in the district courts ²³⁰ shall be composed of twelve men, but nine members of a grand jury shall be a quorum to transact business and present bills.' There is no authority of law for a grand jury composed of any other number of men than twelve. Thirteen do not and cannot constitute a grand jury. If thirteen could be considered a grand jury, so could one, five, fifty or any other number that the fancy of the judge organizing the same might dictate. With respect to petit juries, it is well settled that it must consist of the exact number prescribed by the constitution. In *Stell v. State*, 14 Tex. App. 59, it is said: 'The record must show that the jury was a legal one, and if it does not the error is a radical one, which will be considered on appeal, whether properly availed of in the court below or not, because "due course of the law of the land" demands a legal conviction by a legal jury.' If, then, a trial by jury composed of fewer or more than twelve, the constitutional number, be an infringement of the right of trial by jury, and not a trial by due course of the law of the land, for the same reason the action of a body of men fewer or more than twelve in number cannot be regarded as the action of a grand jury. Such a body of men unknown to the law, and its acts, being wholly without authority of law, are absolutely null, and a pretended indictment preferred by such a body can have no legal standing or effect whatever. It cannot confer any jurisdiction of the case upon the court." To the same effect is *McNeese v. State*, 19 Tex. App. 49; *Smith v. State*, 19 Tex. App. 95; *Ex parte Swain*, 19 Tex. App. 323; *Rainey v. State*, 19 Tex. App. 479. In *Rainey's* case we find this language:

"This error does not appear to us to be a mere irregularity, but one of fundamental and vital importance, such as renders all proceedings, each and every step in the prosecution, void. . . . This objection is not to irregularity in forming, or to the personnel of, the grand jury. The objection that it was composed of thirteen men strikes deeper. It denies that such a body of men, under our constitution, is a grand jury at all. . . . We therefore conclude that the legislature, if disposed, has no power to invest the courts of this state with jurisdiction to try felony cases, save in the manner prescribed in the constitution; that there is no power in the legislature to give jurisdiction over felonies in direct violation of the constitution, nor can the prisoner, either by mistake or unregardedly, confer jurisdiction on the courts to try and punish for felonies. He will not be permitted to sacrifice his life or liberty and entail infamy on his posterity; for this mighty commonwealth has an interest in the lives, liberty, and character of the citizen. . . . To compose a constitutional grand jury, the panel must be composed of twelve persons, neither more nor less. A greater or less number is not a grand jury. The number of persons of which the panel is composed is, in this state, a question of constitutional law; and no man can, by his consent, will, carelessness, or ignorance, constitute a grand jury to convict and punish for a felony. The party must be tried upon an indictment. What an indictment is, is a matter of law. It is the act of a grand jury. What constitutes ²³¹ a grand jury is a matter of law. Unless indicted by a grand jury, there is no jurisdiction in the court to try the defendant; and it will not be questioned that no man, either by his expressed consent, laches, or ignorance, can confer jurisdiction to try for a felony. The citizen cannot be put upon his defense on a charge of felony, or be convicted of crime, except in the exact mode prescribed by law, and a fortiori if prescribed by the constitution": See, also, *Wells v. State*, 21 Tex. App. 596, 2 S. W. 806; *Kennedy v. State*, 22 Tex. App. 693, 3 S. W. 480; *Ex parte Reynolds*, 35 Tex. Cr. Rep. 437, 34 S. W. 120. In the latter case, it was said: "This court has held, and we see no reason for changing our opinion, that a body composed of more than twelve men is not a grand jury." The court cites with approval the former authorities, and proceeds as follows: "The district court, in a felony case, does not obtain jurisdiction of the offense unless by indictment. There must first be the act of a grand jury before the court's

jurisdiction can attach in such case. A prosecution for a felony without indictment by a grand jury is not due process of law. In this state there can be no indictment unless there was a grand jury. The verdict and judgment without indictment, in a felony case, are absolute nullities and cannot be the basis or warrant for any commitment. . . . In this case the court's jurisdiction not having attached, the court therefore had no jurisdiction of the subject matter. The conviction being without due process of law and in violation of the plain requirements of the constitution, the warrant for the imprisonment of the applicant is therefore void, not voidable merely."

Then, if these authorities are correct, and we hold they are, the jurisdiction of the district court cannot attach in felony cases until there has been an indictment preferred by a grand jury. The constitution expressly provides that a grand jury shall consist of twelve men, and having spoken thus emphatically, its mandate must be obeyed; and no other number of men than twelve can constitute a grand jury. Therefore the act of more than twelve men constituting a grand jury will be utterly void and is not the basis of jurisdiction. Without jurisdiction, the district court cannot act in felony cases any more than could the justice of the peace or the county court.

Looking to this question from an analogous constitutional standpoint, we find that judges are disqualified under certain circumstances, among others, where they shall have been of counsel in the case. It has been universally held, so far as we are aware, wherever the record shows, that where the judge who tried the case has been of counsel, he is necessarily, by the language of the constitution, disqualified and without authority to try the case, and the court therefore is without jurisdiction. It is held by an unbroken line of authorities that under such circumstances, the judgment is utterly void: *Abrams v. State*, 31 Tex. Cr. Rep. 449, 20 S. W. 987; *Graham v. State*, 43 Tex. Cr. Rep. 110, 63 S. W. 558. In *Abram's* case, *supra*, we find this language: "The judgment rendered by the court presided over by a disqualified judge is a nullity, and the case would remain undisposed of as completely as if the judge had not been²³² present at the court." And in concluding the opinion it is said: "The trial was a nullity, the judgment void, and the cause stands upon the docket of the district court as if the proceeding complained of in the record had not occurred": Citing *Newcomb v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Chambers*

v. Hodges, 23 Tex. 104; Gains v. Barr, 60 Tex. 676; Lacy v. Barrett, 75 Mo. 469; Trevert v. Swift, 19 Nev. 400, 13 Pac. 6; People v. De La Guerra, 24 Cal. 73; In re White's Estate, 37 Cal. 190; Hall v. Thayer, 105 Mass. 219, 7 Am. Rep. 513; Converse v. Arthur, 17 Barb. 410, 411; Schoonmaker v. Clearwater, 41 Barb. 200; Reams v. Kearns, 5 Cold. 217; State v. Castleberry, 23 Ala. 85; Ochus v. Sheldon, 12 Fla. 138; Strang v. Beloit etc. R. R. Co., 16 Wis. 635; Moses v. Julien, 45 N. H. 52, 84 Am. Dec. 114; People v. Board etc., 1 Hill, 54; Edwards v. Russell, 21 Wend. 63. This is true by reason of the constitutional inhibition against the judge sitting in a case in which he has been of counsel. This language is not any stronger than the guaranty of the constitution, that no man shall be prosecuted for a felony, except upon the indictment of a grand jury.

In *People v. Connor*, 142 N. Y. 130, 36 N. E. 807, the question arose as to the effect of a trial and judgment presided over by a judge who was disqualified by reason of his relation to one of the parties to the suit. This language is found: "The trial proceeded, and proof of the relationship of the justice on the former trial to defendant was made, the defendant's identity established, and all the proceedings on the first trial shown. The court instructed the jury that the plea of former conviction was not sustained unless there was in fact a lawful trial and conviction. That if the former trial was before a court, one of the members of which was related to the defendant within the prohibited degree, then the court was improperly constituted and without jurisdiction in the case; and so the result would be a mistrial, and no bar to another trial. The defendant's counsel excepted to these instructions, and the jury determined the issue upon the special plea in favor of the people." The court of appeals, passing upon that phase of the case, said: "There was no error in the charge or rulings of the court with respect to the effect of the former trial and verdict. Section 46 of the code applies to all trials, civil and criminal. The court before which the first trial was had was so constituted that it was without jurisdiction to try the particular case, and hence all proceedings before it in the case were absolutely void. In contemplation of law there was no trial and no conviction. The trial and verdict were such only in form, without the power or jurisdiction to give any validity or legal effect whatever. When the verdict had been recorded, no legal result had been accomplished that had the slightest effect upon the

rights or liberty of the defendant. It could not be said that he was once in jeopardy within the legal and constitutional meaning of that term, since it implies a verdict or a trial before some court possessing jurisdiction."

We deem the reasoning in the line of cases with reference to the disqualification of judges analogous to that involved in the adjudication of this case. Both are constitutional inhibitions. Under all the authorities, so far as we have been able to ascertain, the judgment of a court rendered on an indictment preferred by an illegal grand jury and a judgment rendered by a judge who is disqualified, are nullities; and the reasoning in both instances are placed upon the same proposition; that is, ²³³ the court under such circumstances has no jurisdiction, and having no jurisdiction its judgments are nullities; there has been nothing tried, no more than if there had been no court at all. If this proposition is correct, and under the authorities it is unanswerable, the presentment of the first indictment into the district court of Hill county was a nullity; the jurisdiction of that court did not attach by reason of the pretended indictment; all of the proceedings had were nullities, as much so as if no indictment had been preferred and no court in session. If this is not correct, it is by reason of the fact that an accused party can confer jurisdiction by consent to try a felony without the indictment preferred by a constitutional grand jury, and having consented to such jurisdiction he waives all his rights that would attach otherwise. Appellant's plea of jeopardy then can only be sustained upon the theory that an indictment is not a prerequisite to a trial and conviction in a felony. If this is not true, then consent can and does confer jurisdiction. If consent can dispense with the indictment, it is by reason of this waiver on the part of the accused of the constitutional provision requiring the presentment of such indictment by a constitutional grand jury. If he can do this, then his conviction would be upheld whether the indictment was or not preferred, and having thus consented, he could not afterward question the conviction or any of its consequences. The judgment would not be void and the writ of habeas corpus would not lie to relieve of the consequences of such conviction. If, by consent under such circumstances, jurisdiction should be conferred and rights waived, then the long line of decisions in this state upon this question are of necessity erroneous, and must be overruled. Counsel for appellant would not maintain the proposition that the conviction was not void. Upon this

he relied in the writ of habeas corpus which discharged him from the results of the first trial. If this indictment was not void, his first conviction was not illegal and the whole matter was but an irregularity. We are of opinion that it was void, and that the indictment in the first case did not confer jurisdiction, nor did it constitute the court trying him one of competent jurisdiction within the meaning of the constitution. We are not discussing the question of defective averments in an indictment, nor informalities or irregularities attendant upon a trial where the jurisdiction of the court has attached. This question lies back of that, because the court was not a court of competent jurisdiction, in that its jurisdiction has never attached. The reasoning in *Ex parte Degener*, 30 Tex. Cr. Rep. 566, 17 S. W. 1111, and *Ex parte Duncan*, 42 Tex. Cr. Rep. 661, 62 S. W. 758, is directly in point.

We are of opinion the court was correct in sustaining the demurrer to that portion of the plea which sets up the time endured under the first proceeding as a credit against the verdict to be rendered in this case. All the authorities we have found bearing on this question are adverse to appellant's contention. Partial payments do not apply to judgments ²³⁴ imposing imprisonment, unless by the pardoning power in the commutation of time. The question of serving out full sentence is not involved, and therefore not discussed. The judgment is affirmed.

If an Indictment is Void, a conviction thereunder may be examined on habeas corpus, and the prisoner restored to freedom: See the monographic note to *Koepke v. Hill*, 87 Am. St. Rep. 186. And it has been held that an indictment returned by a grand jury composed of more men than is legally required is void: *Ex parte Reynolds*, 35 Tex. Cr. Rep. 437, 60 Am. St. Rep. 54, 34 S. W. 120. But see *State v. Cooley*, 72 Minn. 476, 71 Am. St. Rep. 502, 75 N. W. 729; note to *Commonwealth v. Green*, 12 Am. St. Rep. 904.

The Accused is not Put in Jeopardy by a void judgment of conviction, and upon his discharge thereunder he may be again arrested and prosecuted: *State v. Bates*, 22 Utah, 65, 83 Am. St. Rep. 768, 61 Pac. 905; *State v. Bogard*, 25 Ind. App. 123, 81 Am. St. Rep. 84, 57 N. E. 722; *De Bord v. People*, 27 Colo. 377, 83 Am. St. Rep. 89, 61 Pac. 599; *Ex parte Graham*, 43 Tex. Cr. Rep. 463, post, p. 884, 66 S. W. 840.

EX PARTE BAKER.

[43 Tex. Cr. Rep. 281, 65 S. W. 91.]

EXTRADITION—Validity of as Defense.—A person accused of crime committed within the state and extradited therefor from another state is not entitled to his release upon the ground that the extradition proceedings are void. The invalidity thereof can be availed of by him only in the state from which he is extradited. (p. 871.)

EXTRADITION—Invalidity of, no Defense.—A person accused of crime committed within the state may be tried therein therefor although brought into the state from another state against his will and without lawful authority. (p. 871.)

CRIMINAL LAW—Failure to Indict—Rearrest.—If one grand jury fails to indict a person accused of crime, he may be subsequently arrested and held to await the action of another grand jury, especially when there is new evidence tending to connect him with the crime. (p. 871.)

E. H. Yeiser, for the relator.

R. A. John, assistant attorney general, for the respondent.

281 DAVIDSON, P. J. Relator was arrested in March under a complaint charging him with murder. The grand jury was in session, and, having failed to indict, the district judge ordered his release. Some time during the month of August another complaint was filed, charging him with the same murder. In the meantime he had gone to Arkansas. Requisition papers were made out, forwarded and honored by the governor of that state, and relator brought back to Travis county, in this state. He applied for bail before one of the district judges of Travis county, which was granted in the sum of five hundred dollars. This he refused to give, and prosecutes this appeal.

282 The affidavit charging him with murder recites that the affiant verily believes, and has good reason to believe, that appellant was guilty of the murder set out in the complaint. His release from custody is sought because the federal statute requires the party making the affidavit to state the facts upon his own knowledge, and not upon information in regard to the offense sought to be charged; and that, therefore, the whole extradition proceeding was void, viewed from the standpoint of the writ of habeas corpus proceeding in Travis county. Had he sought to take advantage of this position in the state upon which the demand was made, he would have been supported by the authorities: See *Ex parte Rowland*, 35 Tex. Cr. Rep. 108, 31 S. W. 651, and authorities cited. This he did not see proper

to do, so far as this record discloses, and it is too late to undertake to avail himself of that matter in this state. In *Brookin v. State*, 26 Tex. App. 121, 9 S. W. 735, the court said it would not avail defendant against the prosecution that he was arrested by the sheriff of Wilbarger county, Texas, in the Indian Territory, without lawful authority, and brought into this state, and confined in the jail of said Wilbarger county, to be tried for the offense of which he has been convicted. A person accused of crime committed in this state may be tried by courts of this state for such crime, although he may have been kidnapped in another state or territory, and brought thence to this state against his will, and without lawful authority: See, also, *State v. Ross*, 21 Iowa, 467; *Dow's Case*, 18 Pa. St. 37; *Kerr v. Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225, and decisions there cited. The question decided in *Blanford's Case*, 10 Tex. App. 627, is not at issue here.

Appellant further contends that, by reason of the failure of the first grand jury to indict, he could not be subsequently arrested and held to await the action of another grand jury. He cites us no authority on this proposition, and we are of opinion there is no merit in it, especially as it is agreed between the parties that subsequent to the failure of the grand jury to indict the state has newly discovered testimony connecting or tending to connect defendant with the homicide. The case is not brought up on the facts attending the homicide, but simply upon the legal propositions discussed.

We are of opinion the trial court was correct in its various rulings, and the judgment is therefore affirmed.

Brooks, J., absent.

A *Prisoner* who voluntarily accompanies an officer into the state without the use of extradition papers issued in his case cannot afterward object to the regularity of such papers: *State v. Cutshall*, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107. Nor can a fugitive from justice object to the jurisdiction of the court on the ground that the means employed to bring him within reach of its process are without legal authority: See the monographic note to *Matter of Fetter*, 57 Am. Dec. 400; as where he is abducted or kidnapped: *Ex parte Barker*, 87 Ala. 4, 13 Am. St. Rep. 17, 6 South. 7; note to *State v. Hall*, 10 Am. St. Rep. 209. Compare *In re Robinson*, 29 Neb. 135, 26 Am. St. Rep. 378, 45 N. W. 267. And a fugitive extradited for one offense may be tried for a different one: *People v. Cross*, 135 N. Y. 536, 31 Am. St. Rep. 850, 32 N. E. 246; *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945; *Commonwealth v. Wright*, 158 Mass. 149, 35 Am. St. Rep. 475, 33 N. E. 82; *Ex parte Foss*, 102 Cal. 347, 41 Am. St. Rep. 182, 36 Pac. 669. Compare *State v. Hall*, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200, and see the note thereto.

MANNING v. STATE.

[43 Tex. Cr. Rep. 302, 65 S. W. 920.]

RAPE—Evidence of Acts in Another Locality.—On a trial for the rape of a girl within the statutory limit of the age of consent, evidence of acts of sexual intercourse between the parties committed in another county or state is admissible as tending to show an undue intimacy as existing between them. (p. 873.)

RAPE—Evidence.—It is incompetent to prove that the mother of a prosecutrix for rape was keeping a house of prostitution at the time of the alleged crime. (p. 873.)

RAPE—Ignorance of Age of Prosecutrix.—Want of knowledge of the age of the prosecutrix for rape, or an exercise of reasonable care to ascertain her age by the accused, is no defense for the rape of a female within the statutory age of consent. (p. 874.)

RAPE—Evidence—Illegal Acts in Another County.—A person indicted in one county for rape upon a girl within the statutory age of consent committed within such county, cannot be convicted upon evidence alone of acts of illegal intercourse committed by the parties in another county or counties. (p. 874.)

L. B. Dalton, for the appellant.

R. A. John, assistant attorney general, for the state.

303 HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at fifteen years' confinement in the penitentiary.

The indictment charges the rape to have been committed upon one Ivy Benton, she being at the time under the age of fifteen years, and not the wife of appellant. The state offered testimony tending to show sexual intercourse by appellant with prosecutrix in Potter county and in New Mexico. Appellant objected to this on the ground that the same was another and distinct offense, and had no bearing as to the offense committed in Baylor county. While it is true appellant could have been prosecuted for the offense committed in Potter county, as for a distinct offense, still this of itself would not render the evidence inadmissible. The transaction was between the same parties, and would tend to show an intimacy and familiarity between them which, with other circumstances, would tend to show the guilt of appellant as to the transaction charged against him in the indictment: *Hamilton v. State*, 36 Tex. Cr. Rep. 372, 37 S. W. 431.

The court did not err in excluding testimony showing that the mother of prosecutrix was keeping a whorehouse in Seymour at the time of the alleged offense. We fail to see how

this would have any bearing as to the guilt or innocence of appellant.

Appellant contends the court should have given his special requested instructions with reference to his want of knowledge that prosecutrix was under the age of consent, and, if he exercised reasonable care to ascertain her age, he would not be guilty. The doctrine of mistake of fact or honest belief has no application to this character of offense: *Edens v. State* (Tex. Cr.), 43 S. W. 89; *Bishop on Statutory Crimes*, sec. 490; *Bishop's Criminal Law*, secs. 301, 303a, 310; *Lawrence v. Commonwealth*, 30 Gratt. 845; *State v. Newton*, 44 Iowa, 45.

The court properly instructed the jury they could not convict appellant ³⁰⁴ of offenses committed in other counties. We have carefully examined the charge of the court, and, in our opinion, it is a correct enunciation of the law. Finding no error in the record, the judgment is affirmed.

The Crime of Rape is discussed in the monographic note to *Smith v. State*, 80 Am. Dec. 361-375. If the prosecutrix is under the age of consent, it is no defense that the intercourse was not against her will: *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560, 75 N. W. 439; *People v. Verdergreen*, 106 Cal. 211, 46 Am. St. Rep. 234, 39 Pac. 607; or that the defendant was ignorant of her age: *People v. Griffin*, 117 Cal. 583, 59 Am. St. Rep. 216, 49 Pac. 711; *Commonwealth v. Murphy*, 165 Mass. 66, 52 Am. St. Rep. 496, 42 N. E. 504; *State v. Houx*, 109 Mo. 654, 32 Am. St. Rep. 686, 19 S. W. 35. Evidence that he had had intercourse with her prior to the offense charged is admissible to show their relations and the opportunity for meeting: *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862. But evidence of the reputation of the house in which the prosecutrix for rape lives with others is incompetent: *State v. Taylor*, 57 S. C. 483, 76 Am. St. Rep. 575, 35 S. E. 729.

CHAPMAN v. STATE.

[43 Tex. Cr. Rep. 328, 65 S. W. 1098.]

CRIMINAL LAW—Principal in Crime.—The mere knowledge that an offense is being committed or about to be committed, together with the accused's presence and ownership or part ownership of the place where the crime occurs, is not sufficient to constitute the accused a principal in the commission of the offense. (p. 876.)

MURDER by Torture.—If the person accused was present and poured turpentine, or other inflammable liquid, upon the person of the deceased, and ignited with a match or otherwise, such liquid, thereby causing the death of the deceased, he is guilty of murder by torture. (p. 876.)

CRIMINAL LAW—Principal in Crime—What Constitutes.—To constitute a person accused of crime a principal therein he must be present thereat and knowing and adopting the unlawful intent of the other parties, he must aid by acts, or encourage by words or gestures,

and consent to the commission of the crime. It is not necessary that the principal, being present, should do some act at the time in order to constitute him a principal; but he must encourage by acts or gestures, either before, or at the time of the commission of the offense with full knowledge of the intent of the persons who commit the offense; otherwise he cannot be convicted as a principal. (p. 877.)

MURDER by Torture—Presence and Acts of Accused.—If a person accused of murder simply poured turpentine upon the person of the deceased with no intent that it should be set on fire to kill him and was merely present when someone else set fire to the deceased, but did not agree to adopt the unlawful act and intent either by words or action, the presence of the accused, together with the fact that he thus poured the turpentine, do not alone constitute him guilty of the murder resulting from the firing of the turpentine by another. To make him guilty he must in some way consent and to some degree co-operate, either by acts or words, in the real commission of the crime. (p. 878.)

TRIAL—Improper Conduct of Counsel.—A person on trial for murder is not subject to have his hands “jerked up violently in the presence of the jury” by the prosecuting counsel for the purpose of showing whether or not such hands have scars or burns on them. Such procedure should not be indulged in nor permitted. (p. 880.)

MURDER—Res Gestae.—Declarations by deceased one hour and one-half after a burning of his body which afterward resulted in his death, to the effect that someone unknown to him threw turpentine on him and that he had twenty-six dollars on his person at the time, are admissible in evidence as part of the *res gestae* on the trial for his murder. (p. 881.)

MURDER—Res Gestae.—Declarations by the deceased in answer to questions made four hours after a burning of his body which subsequently resulted in his death are not admissible in evidence as part of the *res gestae* on a trial for the murder of the deceased. (p. 881.)

MURDER—Evidence of Intent.—On a trial for murder by burning the deceased, evidence that shortly prior to the commission of the crime, the codefendant and partner of the accused, in the saloon where the crime was committed, took a piece of grass rope from under his apron and threw it behind the bar, where it was found two days after the commission of the crime, is admissible to show a malevolent intent on the part of the accused and of his codefendant. (p. 882.)

MURDER—Evidence of Intent.—On a trial for murder by burning the deceased, evidence to show that a small bottle which smelled like it had chloroform in it was found soon after the commission of the crime in the saloon of the accused where the crime was committed is admissible to show his malevolent intent and that the deceased was stupefied by some character of fluid. (p. 882.)

MURDER—Evidence of Motive.—If on a trial for murder it appears that the deceased was robbed before he was murdered it is competent to show that immediately after the crime the accused had money on his person, although such money is not identified as having belonged to the deceased. (p. 883.)

R. B. Allen, E. B. Terrell and Ford & Crawford, for the appellant.

J. C. Muse, S. H. Russell and R. A. John, assistant attorney general, for the state.

334 BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

This is a companion case to that of *Faulkner v. State*, 43 Tex. Cr. Rep. 311, 65 S. W. 1093.

In bill of exceptions No. 7, appellant complains of the following portion of the court's charge: "If you believe from the evidence beyond a reasonable doubt that in Dallas county, Texas, on or about December 3, 1900, the defendant, either alone or as a principal with others, did steal or was present at the stealing of money and shoes, or either, from the person of C. P. Bane, and did pour turpentine or other inflammable liquid upon his person, or was present when turpentine or other inflammable liquid was poured upon him, and did ignite with a match said fluid or liquids, or was present when the same was done by others; and that he (defendant) did then and there know of such theft, turpentineing and setting on fire of said C. P. Bane, and was the owner or one of the owners of the place in which said act occurred, then he (defendant) would be guilty, as principal, of murder by torture, in the first degree, and you should so find, and frame your verdict as above directed." Appellant's objections are: 1. Because the language used is upon the weight of evidence; 2. Because the issue of murder by torture is not raised by the evidence; 3. And, if raised, should have been submitted to the jury as a question to be determined by them from all the evidence in the case; 4. Because in applying the law to the facts the court permits the jury to convict defendant as a principal if they believe beyond a reasonable doubt that he was present and knew that the offense was about to be committed, and was the owner, or one of the owners, of the place in which said act occurred, and that regardless of whether or not defendant was acting together with others who actually committed the offense. In other words, the court makes the mere knowledge that an offense is being committed, or about to be committed, together with defendant's presence and ownership, or part ownership, of the place where the offense occurred, sufficient to constitute defendant a principal in the commission of the offense. We think the issue of murder by torture is raised by the evidence, and the definition of torture as contained in the court's charge is correct. Nor do we think the court assumes in the charge that, if death result, the killing would be murder by torture, for the court had told

the jury what was murder by torture, and then tells the jury if defendant did pour turpentine or other inflammable fluid upon his person, etc., and deceased was burned up, it would be murder by torture. The vice in this charge is embodied in the last contention of appellant. The mere fact that appellant may have been owner or part owner of the saloon where the burning occurred would not make him guilty of the murder, and such ³³⁵ should not have been embodied in the charge. The most that such circumstances could be used for would be as tending to show guilt. Certainly the fact that appellant owned the house would not per se establish that he was particeps criminis to murder committed in said house. It might be used by the jury as a circumstance in passing upon the question as to whether appellant co-operated, consented, and conspired with the other persons in the commission of the crime; but, being a mere circumstance, it would not require a charge by the court thereon. We think the charge of the court is erroneous, as contended by appellant, for it makes the bare presence and knowledge on his part that an offense was about to be committed, and that he was the owner or part owner of the place, proof positive of the fact that he was acting together with others in the commission of the offense. Certainly the presence of a person at the place where the crime is committed is a prerequisite for the conviction of such party as a principal. Knowledge on the part of the person that the crime is being committed is also a prerequisite to his guilt. But neither of said facts would necessarily establish appellant as the principal to the crime with which he was charged. The court should have instructed the jury, after defining principals as laid down by the statute, that, if defendant was present, knowing the unlawful intent of the other parties, naming them, and that he adopted said intent, and while present he aided by acts or encouraged by words or gestures and consented to the commission of the crime, then, in that event, he would be guilty as a principal. It is not necessary that the principal should do some act at the time, aside from being present, in order to constitute him a principal, but he must encourage by acts or gestures, either before, or at the time of the commission of the offense, with full knowledge of the intent of the parties who commit the offense, otherwise he cannot be convicted as a principal.

By bill of exceptions No. 8 appellant complains of the following portion of the charge: "If you believe from the evi-

dence, beyond a reasonable doubt, that in Dallas county, Texas, on or before December 3, 1900, that any person or persons bought turpentine or other inflammable liquid, and carried it into the saloon of Chapman & Faulkner, and that said turpentine or other such fluid was poured upon the body of said C. P. Bane by any person or persons, and that said turpentine or other inflammable fluid was set on fire by an ignited match by any person or persons, and that defendant was present in said saloon, and knew said turpentine or other inflammable fluid was poured or being poured or placed upon said Bane by any person or persons, and said match ignited, and fired said turpentine or other inflammable fluid by any person or persons, and that such act of setting afire said turpentine or other inflammable fluid by any person or persons might probably result in the death of said Bane, and that said defendant then and there reasonably knew that such act might so result, and that defendant was then and there the owner or one of the owners of said saloon, and that said burning of said Bane occurred in said saloon, and caused the ³³⁶ death of said Bane, then, in that event, defendant would be guilty, as a principal, of murder in the first degree, by torture, whether he participated in the said act or not, and whether it was intended to kill the said Bane or not, or whether the said Bane had been robbed or not; and, without reference to what the unlawful intent of setting the said Bane on fire may have been, you should so find and frame your verdict as above directed." This charge is clearly erroneous. The fact that appellant should have consented to the pouring of turpentine upon the person of deceased would not per se make him guilty of murder. In all prosecutions for crime under our law the gist of every offense is the intent of the defendant. If defendant poured fluids upon the person of deceased without any thought or expectation that some one else would ignite the turpentine, and thereby cause the death of deceased, he would not be guilty of any grade of offense higher than a misdemeanor. In order to make appellant guilty he must adopt the intent of that party, and the proof must satisfy the jury beyond a reasonable doubt that Chapman, while present and knowing the unlawful intent of the other parties, assisted them not only in pouring turpentine, but in all other criminal acts leading up to the destruction of the life of deceased, and adopted said acts as his own. The conclusion of the above clause: "Then, and in that event, defendant would

be guilty, as a principal, of murder in the first degree, by torture, whether he participated in said act or not, and whether the said Bane had been robbed or not, and without reference to what the unlawful intent of setting the said Bane on fire may have been." This is clearly contradictory of the law of principals as given by the court in the first part of the charge. Certainly, if appellant did not participate in the crime, he would not be guilty; and if he did not intend to kill deceased he would not be guilty. But if appellant, either alone or acting with others, placed turpentine upon deceased, which turpentine was by appellant or the others with whom he was acting set on fire, and appellant reasonably expected that death would ensue from said act, and, so believing, set fire to the said Bane, then appellant and those who participated with him in the commission of the offense would be guilty as charged by the court, of murder in the first degree. But, if he poured turpentine upon the person of deceased without such intent, he would not be guilty, and the court should have so charged. Furthermore, the court should have told the jury that the fact defendant poured turpentine upon the person of deceased, and was present when some one else set fire to deceased, and did not adopt the intent and agree to the unlawful act, either by words or action, appellant's presence and the fact that he poured turpentine alone would not constitute him guilty of murder. We have repeatedly held that presence and knowledge that an offense is about to be committed or is being committed would not per se render such person guilty as a principal to the commission of the offense, but there must be some consent and co-operation of some character on the part of the person present in the commission of the offense, before he would be guilty of any offense. 337 These principles of law should have been applied by the court to this phase of the case.

In his motion for new trial appellant insists that the evidence called for a charge on murder in the second degree and negligent homicide. We do not think so. The evidence does not raise any degree of murder except murder of the first degree.

Bill No. 13 complains that while P. J. Donovan was on the stand and being cross-examined by counsel for the state the witness testified that a man, who, in the best judgment of witness, was the defendant John Chapman, rushed in through the front door of the saloon, and seized the burning man,

and threw him to the floor, and tried to extinguish the fire. State's counsel asked the witness if defendant had his hands in the flames, to which the witness answered that he did. Defendant at this time was seated between his own and state's counsel. And when the witness so testified the state's counsel turned and seized one of defendant's hands, and jerked it up violently in the presence of the jury, and before defendant could prevent it, and where the jury could see it, and said to witness, "Look at this hand and tell the jury whether or not you see any burns or scars on it now." Defendant's counsel objected to such unlawful conduct on the part of state's counsel and state's counsel stated to the court, in the presence and hearing of the jury: "Yes, sir; I offer the defendant's hands in evidence before this jury. I have a right to do it." We do not think this character of procedure should be indulged or permitted. If defendant did not have scars on his hands, this fact could have been proved without him "being jerked up violently in the presence of the jury."

Bill of exceptions No. 14 presents the following: "Dr. McFerrin, assistant city physician, was permitted to testify, over appellant's objections, that receiving a call at the city hospital between 12 and 1 o'clock, they went to the saloon where the burning occurred, which was about a mile and a half from the city hospital, and reached the saloon in about twenty-five minutes. We examined the deceased and dressed his wounds at the saloon. He was burned all over from his knees up. He was so badly burned that his body was hard and crisp, and parts of his body were brittle, and the burned flesh could be knocked off with the fingers. He was placed in the ambulance, and carried to the hospital. He suffered intensely, and to such an extent that it was difficult to keep him in one position. He was constantly turning and twisting. His body was nude and we covered it with gauze dressing, and had sheet and blankets spread over him. He made no statement to anyone on the way to the hospital. Witness gave him a hypodermic injection of a quarter of a grain of sulphate of morphin before leaving the saloon. It took about half an hour to reach the hospital, and after arriving there we changed the dressings, occupying about twenty-five minutes' time. During all of that time he was still suffering greatly. There was no break in his agony and suffering at any time. After the second dressing ³³⁸ at the city hospital he was given another hypodermic injection similar to the previous one. The

morphin seemingly had no effect on him. This was due to his suffering and agony. About an hour and twenty-five minutes after receiving the telephone call, and after the second dressing at the hospital, witness asked deceased 'if he had any coal oil, or gasoline, or turpentine, or anything of that kind on him at the time he caught fire'; and he replied, 'No; that he didn't have anything at all.' Witness then asked him 'if some one had thrown this on him,' and he said, 'Yes'; and he was then asked 'if he knew who they were,' and he replied 'he did not know, but that he would know them if he saw them.' Witness then asked 'if he had any money on him at the time,' and he said that 'he had twenty-six dollars.' Witness then told him he could not get well, and deceased said nothing further at that time, though he repeatedly stated, both before and after this conversation, that he was not going to die. About two hours and a half after deceased was brought from the saloon, witness had another talk with him, which conversation was a little more than an hour after the one just detailed. At the time of this conversation witness was dressing deceased's wounds, and greasing them with vaseline, and deceased was suffering greatly. There was no diminution of his suffering until about 4:30 or 5 o'clock, when he became delirious, and after that did not recognize anyone, and died about 6 o'clock. In the examination at the saloon we found his eyes were burned out. His suffering was unabated up to and after witness had both conversations with him. When witness had the second conversation, he asked 'if he had a nickel with a hole in it,' and deceased said that he had a disfigured nickel. Witness asked him, 'how this nickel was disfigured—if it had a hole in it,' and he said, 'Yes.' Witness then asked him 'if he knew anyone that was in the saloon,' and he said he did not, but contended he would know them if he could see them. He said that one man was tall, over medium height, and had either a black mustache or a brown mustache—witness not recollecting which; that there was one small man present; and he said he had been playing something some time before; witness believes he said it was pool. At the time of this last conversation he was still suffering extreme agony, and there was no diminution whatever in the extent of his suffering." We think the first conversation comes within the rule laid down by us in *Freeman v. State*, 40 Tex. Cr. Rep. 546, 46 S. W. 641, 51 S. W. 230, where the principles of law governing this character of testimony were entered into. The second con-

versation, however, relating to the disfigured nickel, we do not think comes within the rules of *res gestae*. It has none of the elements of "instinctiveness or spontaneity," which are two of the chief characteristics of this kind of testimony. The answers of deceased were in response to leading questions asked him, and a long while after he had reached the hospital, some distance from the saloon.

Bill of exceptions No. 16 reserved by appellant complains that Will Pruitt testified: "When my brother, Drew Pruitt, and myself ³³⁹ got to the saloon of Chapman & Faulkner, we went in to warm. Nobody was in the front room. We walked back to the stove in the back room. John Chapman, Eugene Faulkner, Bane, and the man by the name of Young were all back at the stove. Chapman asked us, after we stood there and talked a few minutes, to take a drink. We walked in to the bar, and Faulkner went around behind the bar to serve the drinks. When he got behind the bar, he took a piece of grass rope out from under his apron and threw it under the bar. After that he picked it up again, and threw it up farther toward the end of the bar." And the witness Kirby testified "that on the second day after the burning of Bane he was in the building where the burning occurred, and found a piece of grass rope under the bar." The piece of rope so found was introduced in evidence over the objections of appellant. Appellant insists that said testimony was irrelevant and highly prejudicial, as there was absolutely no evidence on the part of said witness to connect the piece of rope in question in any way with the transaction resulting in the death of Bane; that the evidence was calculated to mystify and mislead the jury. We do not think appellant's position is correct. It appears from the record that the state offered this testimony as a circumstance to show some malevolent intent on the part of Faulkner toward deceased. It may be a vague circumstance to establish this fact, but, being a part and parcel of the *res gestae* of the transaction as detailed by the witnesses, it was admissible as illustrative of said intent, and was admissible for that purpose, to be given its proper weight by the jury. The same may be said with reference to the small bottle found by witness Kirby in the saloon, which smelled like it had chloroform in it, it being admissible as showing the intent of appellant, and as a circumstance tending to show deceased had been stupefied by some character of drink. The probative force of said circumstance would not render

the same inadmissible. If the circumstance is meager, it would still be admissible as going to prove a fact germane to the transaction.

The seventeenth bill of exceptions complains that the court permitted John Willie and Jim Brannon to testify that shortly after the burning of Bane they arrested appellant, and carried him to the city hall, searched him, and found on his person sixty-one dollars and eighty-five cents, thirty-one dollars of which was in paper currency and the balance in silver; and they also found on the person of defendant a nickel with a hole in it. The nickel was identified by the witnesses as the one taken from the person of defendant. Appellant insists said testimony was not admissible, because none of the money was shown to have been in the possession of deceased, and was not shown to have any connection with the burning of deceased. The proof tended to show that deceased had been robbed prior to the time the turpentine had been poured on him. The fact that appellant was found with money in his possession immediately after the robbery might be a circumstance to prove the fact that deceased had been robbed, although the money may not have been identified as the money of deceased; yet this ³⁴⁰ would go to its probative force, and not to the admissibility of the testimony.

Appellant has reserved various bills of exception to the argument of state's counsel. In view of the disposition of this case, we only deem it necessary to say that counsel should not permit their zeal in the prosecution or defense of parties to force them beyond the decorums and proprieties of the profession. The argument should be limited to the testimony adduced upon the trial of the case. As to what the citizenship may have done under any particular contingency with reference to the guilt or innocence of defendant has nothing to do with his trial. Be he ever so guilty, under the beneficent principles of our law he is entitled to a fair and impartial trial before a jury upon the law and testimony, which testimony must be adduced under the rules of evidence established centuries ago, and approved by the consensus of wisdom of all courts of all countries. We do not deem it necessary to pass upon the guilt or innocence of appellant. Suffice it to say that a bare inspection of this record will disclose the fact that he has not been accorded a fair and impartial trial under the laws of this state, and, whether he be guilty or innocent, this right the law and constitution of this state guarantee him.

It is our duty to see that these rights are awarded and accorded him in the courts.

For the errors discussed, the judgment is reversed and the cause remanded.

Davidson, P. J., absent.

In the Matter of Res Gestae time is not necessarily a controlling element: *Honeycutt v. State*, 42 Tex. Cr. Rep. 129, 57 S. W. 806, ante, p. 797, and cases cited in the cross-reference note thereto; monographic note to *People v. Vernon*, 95 Am. Dec. 59.

Compelling the Accused in a criminal case to perform acts and submit his person to examination or inspection is discussed in the monographic note to *State v. Height*, 94 Am. St. Rep. 336-347.

All Persons Present at the Commission of a wrongful act and participating therein by counsel and advice are principals: Willi v. Lucas, 110 Mo. 219, 33 Am. St. Rep. 436, 19 S. W. 726. But the mere presence of a party is not sufficient to constitute him principal, unless there is something in his conduct showing a common design to encourage, incite, or in some manner abet or assist in the crime. Aiding, abetting, and assisting are affirmative in their character. It is not sufficient that there is a mere negative acquiescence, not in any way made known to the principal malefactor: *White v. People*, 139 Ill. 143, 32 Am. St. Rep. 196, 28 N. E. 1083; *Connaughty v. State*, 1 Wis. 159, 60 Am. Dec. 370.

EX PARTE GRAHAM.

[43 Tex. Cr. Rep. 463, 66 S. W. 840.]

JUDGMENTS—Effect of Void.—A judgment in a case in which the trial judge is disqualified is void and will not sustain a plea of former jeopardy, or entitle an accused to bail. (p. 885.)

JUDGMENT Denying Bail in a murder case where the proof is evident is valid. (p. 885.)

R. A. John, assistant attorney general, for the state.

463 BROOKS, J. Relator applied for a writ of habeas corpus before Honorable Sam R. Scott, special judge duly appointed by the governor **464** to try this case. The hearing was originally had in Falls county, bail being denied. The case was appealed to this court and reversed, the application being ordered heard in Robertson county: *Ex parte Graham* (Tex.), 64 S. W. 932. In pursuance of that order the case was heard in Robertson county, bail being denied, and relator remanded to custody and this appeal is prosecuted.

It appears that relator has heretofore been tried, the jury finding him guilty of murder in the second degree. At that trial Hon. John L. Goodman presided as special judge. Upon the appeal of the case we held that the judge was disqualified, and because of his disqualification the judgment was reversed. On that appeal we said: "The trial judge being disqualified, as indicated above, the whole proceeding became an absolute nullity, the judgment void, and the cause stands upon the docket of the district court of Robertson county as if the proceeding complained of in this record had never occurred": *Graham v. State*, 43 Tex. Cr. Rep. 110, 63 S. W. 558; 2 Tex. Ct. Rep. 822. A void judgment would not sustain a plea of former jeopardy to any offense: *Ogle v. State*, 43 Tex. Cr. Rep. 219, ante, p. 860, 63 S. W. 1009; 2 Tex. Ct. Rep. 960. The constitution authorizes bail in all cases where the proof is not evident. We have carefully examined this record and considered the evidence adduced, and are of opinion that the judgment of the lower court denying relator bail is correct. The judgment is affirmed.

Under Article 5, Section 11 of the Constitution of Texas a judge is disqualified to try a case if he is related either by consanguinity or affinity to the accused or the injured party, within the third degree, and it was decided in *Gresham v. State*, 43 Tex. Cr. Rep. 466, that a judgment rendered by a judge disqualified by such relationship to the accused is absolutely null and void, and that the consent of the parties that such judge should sit in and decide the case, could not remove his incapacity nor restore his competency.

A Judgment rendered by a disqualified judge is not void at the common law, but merely voidable, except in the case of inferior tribunals from which no appeal or writ of error lies. In most of the states, however, statutes have been enacted which expressly prohibit a judge from acting in certain cases, and his judgment therein is void wherever brought in question: See the monographic note to *Moses v. Julian*, 84 Am. Dec. 127, 128; *Chicago etc. Ry. Co. v. Summers*, 113 Ind. 10, 3 Am. St. Rep. 616, 14 N. E. 733; *Board of Commrs. v. Justice*, 133 Ind. 89, 36 Am. St. Rep. 528, 30 N. E. 1085; *Horton v. Howard*, 79 Mich. 642, 19 Am. St. Rep. 198, 44 N. W. 1112. Consult, also, *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639. That a void judgment will not sustain a plea of former jeopardy, see *Ogle v. State*, 43 Tex. Cr. Rep. 219, 63 S. W. 1009, ante, p. 860, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

NOBLETT v. BARTSCH.

[31 Wash. 24, 71 Pac. 551.]

MALICIOUS PROSECUTION—Probable Cause—Burden of Proof.—Mere discharge of a person from a criminal charge without a hearing upon the merits, while sufficient to make out a *prima facie* case of want of probable cause, does not throw the burden of proving probable cause upon the defendant in an action for malicious prosecution. (p. 888.)

MALICIOUS PROSECUTION—Partner's Liability.—A partner as such is not liable for a malicious prosecution instituted by his copartner unless committed in the course of, and for the purpose of transacting, the partnership business. (p. 888.)

MALICIOUS PROSECUTION—Liability of Partner.—A prosecution for larceny is not within the scope of the business of a mercantile partnership, and there is no presumption of participation therein by all of the partners, so as to charge them all for a malicious prosecution without proof of the participation of all of them therein. (pp. 888, 889.)

J. E. Humphries and H. Bostwick, for the appellants.

²⁵ FULLERTON, C. J. This is an action for malicious prosecution. The respondent was arrested on a warrant issued by a magistrate charging him with the crime of bringing stolen property into this state from a foreign country, and confined in jail for about one week's time. At the time fixed for the preliminary hearing he was discharged at the request of the prosecution without examination or any evidence being brought against him. The property which he was charged with having brought into the state was alleged to be the property of a partnership composed of the appellants, and to have been stolen by one G. E. Daniel, at Dawson, in the Northwest Territory, where Daniel had been connected in business in some form

with the partnership. The respondent alleged in his complaint that the prosecution was instituted maliciously and without probable cause, and that he was damaged thereby in the sum of fifty thousand dollars. The jury returned a verdict in his favor for one thousand dollars, and it is from the judgment entered thereon that this appeal is prosecuted.

The court gave to the jury the following instructions:

"2. In an action for malicious prosecution, the fact that the plaintiff was discharged by the examining magistrate without hearing on the merits throws the burden of proving probable cause on the defendants."

"4. The dismissal of the prosecution alleged in the complaint without a trial is competent not only for the purpose of showing an end of the prosecution, but in addition it establishes a prima facie case of want of probable cause, and throws upon the defendants the burden of proving that there was a want of probable cause for the prosecution of the plaintiff."

26 "8. You are instructed further that the presumption exists that there was probable cause, and that the defendants acted without malice and in good faith in instituting the criminal prosecution, and that presumption stands until the plaintiff shows by a preponderance of the testimony that there was a total absence of probable cause, and that the prosecution was malicious; and if the plaintiff has failed to prove to your satisfaction, by a preponderance of testimony, the total lack of probable cause, and malicious institution of prosecution, then your verdict must be for the defendants. In connection with this instruction, however, I charge you that proof that the plaintiff was discharged at the preliminary hearing without a trial on the merits constitutes prima facie proof of the want of probable cause, and throws the burden of disproving it upon the defendants."

From these instructions it will be observed that the trial court took the view that the showing on the part of the respondent that the prosecution against him was voluntarily dismissed cast the burden of showing probable cause therefor upon the appellants. Assuming that a voluntary dismissal is equivalent to a discharge by the committing magistrate, there are cases which maintain this view: *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138; *Barhight v. Tammany*, 158 Pa. St. 545, 38 Am. St. Rep. 853, 28 Atl. 135; *Bigelow v. Sickles*, 80 Wis. 98, 27 Am. St. Rep. 25, 49 N. W. 106; *Bornholdt v.*

Souillard, 36 La. Ann. 103. On the other hand, there are cases which hold that a discharge by a committing magistrate is not even evidence of want of probable cause: *Stone v. Crocker*, 24 Pick. 84; *Lancaster v. Langston*, 18 Ky. Law Rep. 299, 36 S. W. 521; *Israel v. Brooks*, 23 Ill. 575; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Heldt v. Webster*, 60 Tex. 207; *Apgar v. Woolston*, 43 N. J. L. 57. Others, again, announce the rule that the showing of a discharge by the committing magistrate is evidence of ²⁷ want of probable cause, sufficient to make a prima facie case, but does not shift the burden of proof: *Cooley on Torts*, 184; 3 *Lawson's Rights, Remedies and Practice*, sec. 1084; *Eastman v. Monastes*, 32 Or. 291, 67 Am. St. Rep. 531, 51 Pac. 1095; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Vinal v. Core*, 18 W. Va. 1; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007. This latter is, we conceive, the correct rule. Generally the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and there is no apparent reason for making an exception in favor of actions for malicious prosecutions, more particularly as to the issue now in consideration. The very gist of an action for malicious prosecution is want of probable cause. The truth of other material allegations, such, for example, as malice, may be inferred from proof of want of probable cause, but this allegation, being of the very substance of the issue, must be substantially and expressly proved, and is never inferred or implied from the proof of anything else. We think, therefore, that the burden of proving this issue remained upon the respondent throughout the trial, and that the court erred in charging the jury to the contrary.

The court refused to charge the jury to the effect that one partner is not liable for a malicious prosecution instituted by his copartner, unless he advises, directs, or participates therein, even though the prosecution be purported to be instituted for some wrongful or criminal act with relation to property belonging to the firm. This was error. The rule is that a partner, as such, is not liable for a malicious prosecution instituted by his copartner unless committed in the course of, and for the purpose of transacting, the partnership business. As a prosecution for larceny is not within the scope of a business of a ²⁸ mercantile partnership (the business engaged in by the appellants), there could be no presumption of participation by all of the partners, and it was necessary that this fact

be proven: *Marks & Co. v. Hastings*, 101 Ala. 165, 13 South. 297; *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Rosenkrans v. Barker*, 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93. The evidence, however, was conflicting on the question whether or not all of the appellants participated in the prosecution, and the jury should have been instructed on both sides of the question.

It is contended that the court erred in refusing to grant a nonsuit in favor of all of the appellants. This is based on the claim that the appellants fully and fairly stated all of the facts of their case to the prosecuting attorney of King county, and that the prosecution was instituted with his consent and advice. The trial court took the view that there was such a substantial dispute in the evidence as to make this question one for the jury, and instructed them on that theory. A perusal of the record inclines us to the belief that the court correctly interpreted the evidence, and hence we find no error in its refusal to grant a nonsuit.

The judgment is reversed and the cause remanded for a new trial.

Dunbar, Mount, Hadley and Anders, JJ., concur.

The Malicious Prosecution of civil actions is the subject of a monographic note to *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 454-474; and the malicious prosecution of criminal actions is the subject of a monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 127-164. A partnership is liable for a malicious prosecution united in by all the members for the purpose of furthering the interests of the firm: *Page v. Citizens' Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144, 36 S. E. 418. But one partner is not liable for a malicious prosecution for larceny instituted by a copartner if he has not participated therein: See the monographic notes to *Williams v. Hendricks*, 67 Am. St. Rep. 40; *Ross v. Hixon*, 26 Am. St. Rep. 133. As to a principal's liability for a malicious prosecution by his agent, see the monographic note to *Franklin Fire Ins. Co. v. Bradford*, 88 Am. St. Rep. 793, 794.

BURGERT v. CAROLINE.

[31 Wash. 62, 71 Pac. 724.]

GUARDIAN AND WARD—Payment of Taxes—Right to Lien.

A guardian for minors holding land as tenants in common with adult persons, who pays delinquent taxes on the common property with his own funds to protect the interests of his wards, is entitled to a lien on the lands for the amount so paid as against all of the owners thereof. (p. 893.)

J. H. Lewis, T. B. Hardin and L. V. Newcomb, for the appellant.

J. McNeny, for the respondent.

⁶³ FULLERTON, C. J. The appellant seeks by this action to be reimbursed for taxes paid by her on certain lands belonging to the respondents. Demurrers were interposed and sustained to her complaint, after which she elected to stand thereon, whereupon judgment of dismissal and for costs was entered against her. This appeal is from that judgment.

The pertinent facts upon which the appellant bases her claims are these: In 1892 her children, eight in number, became the owners as tenants in common, of certain land situate in the city of Seattle, in this state. Of these children, one had then reached the age of majority, and another reached that age in the following year. The others were and still are minors, and appellant between the month of February, 1892, and the month of April, 1900, was their duly appointed, qualified, and acting guardian. State, county, and city taxes were annually levied and assessed against the property during the time the appellant was acting as such guardian, and on November 1, 1899, amounted, in principal, interest, penalties, and costs, to the sum of one thousand three hundred and sixty dollars and ninety-nine cents. All of these taxes were then delinquent, and for a part thereof—those for the year 1895 and preceding years—a judgment of forfeiture had been entered, and a delinquency certificate issued therefor, pursuant to law, to the county of King. The land was nonproductive, and the appellant did not have, as guardian, any funds or means whereby she could pay these taxes. This being the condition on November 1, 1899, the appellant requested the adult tenants in common to pay their portion of the taxes then due, and, on their failure so to do, paid the entire tax out of her own funds, redeeming the land from the judgment of forfeiture, and causing to be canceled all of the taxes assessed against the land and ⁶⁴ due at that date. Subsequent to this payment, one of the adult owners conveyed her interest in the land to one Huston, who in turn conveyed to the respondent, Pat Caroline, each of whom, it is alleged, purchased with knowledge of the circumstances and of the fact that the appellant claimed a lien on the land. Still later, the appellant resigned her trust as guardian, and was succeeded by the respondent, Bernard Pelly. The appellant sues the guardian

by leave of court. She seeks to have the amount paid by her as taxes declared a lien upon the land against which it was assessed, and to have the lien foreclosed and the land sold to satisfy the same. The principal question suggested by the record therefore is, Has the appellant a lien on the land for the taxes paid by her?

It is elementary, of course, that one person cannot ordinarily make himself the creditor of another by paying, without request or consent, the debt of that other; and, applying this principle, it is generally held that a stranger to the title to real property cannot make himself the creditor of the owner of the property by voluntarily paying the taxes assessed against it. Every taxpayer, it is said, has the right, as between himself and a third person, to pay his taxes in his own time and in his own way, and to the municipality to which it is due, and cannot be compelled to accept as a creditor a stranger who voluntarily makes such payments. But, notwithstanding the rule is thus clear when applied to payments of taxes made by a volunteer, it is equally clear that a person having a valid subsisting interest in real property, or a lien thereon, may pay the taxes assessed against the property whenever it becomes necessary to protect his interests or lien, and can enforce a lien on the land, for the amount paid, against the interests of any person who in justice ought to have paid the ⁶⁵ tax. In this state the rule is even broader than this. By statute it is declared that: "When any tax on real estate is paid by or collected of any occupant or tenant, or any other person, which, by agreement or otherwise, ought to have been paid by the owner, lessor or other party in interest, such occupant, tenant or other person may recover by action the amount which such owner, lessor or party in interest ought to have paid, with interest thereon at the rate of ten per cent per annum, or he may retain the same from any rent due or accruing from him to such owner or lessor for real estate on which such tax is so paid; and the same shall, until paid, constitute a lien upon such real estate": Ballinger's Code, sec. 1738.

In *Farrell v. Gustin*, 18 Wash. 239, 51 Pac. 372, we held that taxes paid after the foreclosure of a junior mortgage, but prior to the expiration of the time for redemption, although not delinquent, might be recovered as a lien on the land against the rights of the redemptioner or a prior mortgagee: So in *Fisher v. Woodruff*, 25 Wash. 67, 87 Am. St. Rep. 742,

64 Pac. 923, we held that a junior mortgagee who had paid taxes on the mortgaged property for the purpose of protecting his mortgage lien, and without knowledge of the existence of a prior mortgage thereon, was entitled to have the sum paid declared a lien superior to the prior mortgage. And in *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846, we held that a judgment creditor who had paid the taxes on his debtor's lands, under the belief that his judgment was a lien thereon and that he was protecting his lien by so doing, was entitled to a lien for the sum so paid as against a mortgagee of the land. This statute and these cases but emphasize the fact that it is the policy of the law to encourage the payment of taxes. The government, in order to exist, must not only levy a tax at stated intervals ⁶⁸ on all the property within its jurisdiction, but must insist that the tax levied be paid within a reasonable time. The law does not, therefore, inquire too nicely into the interests or motives of those who pay taxes lawfully assessed upon property. But it will, whenever the interests of justice require it, allow those who have an interest or a bona fide claim of interest in the property of another, and who have paid taxes thereon which rightfully should have been paid by that other, a lien against the land for the amount of the taxes paid.

But it is said that the appellant does not fall within the rule of one having an interest or a bona fide claim of interest; that she was at most only guardian of some one who had an interest and who might have paid the taxes but had personally no such interest as would authorize her to pay them out of her own funds. It seems to us, however, that she had such an interest as would bring her within the provisions of the rule above cited. As guardian, it was her duty to protect the interests of her wards in every way in her power. While her duty did not go so far as to require her to pay from her own funds the taxes accumulated upon her wards' property, yet she had the right to do so, and to be reimbursed out of their property for the amount so paid. Had she purchased the property with her own funds at a tax sale, equity would not have permitted her to hold it against the claim of her wards. As she could not purchase the estate for her own interest, justice requires that she should not be held a volunteer when she purchases for her wards. But it is said further that, whatever view may be taken of her rights, when considered with reference to her wards, she was a volunteer so far as the adult

owners were concerned. We do not think so. The property was assessed and the tax levied as a whole, and she, as the representative of one ⁶⁷ tenant in common, had the right as against the others to pay the whole tax, and can recoup, under the statute, a just proportion of the amount paid from each of the several owners.

Concluding, therefore, that the complaint states a cause of action, the judgment is reversed, and the cause remanded with instructions to overrule the demurrers and require the defendants to answer to the merits.

Mount, Dunbar and Anders, JJ., concur.

That a Guardian is entitled to reimbursement for taxes paid upon the land of his ward, see the monographic note to Schmidt v. Shaver, 89 Am. St. Rep. 314.

STATE v. SHARPLESS.

[31 Wash. 191, 71 Pac. 937.]

CONSTITUTIONAL LAW—Title of Statute.—The title "An act to regulate the practice of barbering and licensing of persons to carry on such practice, and providing punishment for its violation," is broad enough to validly embrace provisions for the appointment of a board of examiners, defining their duties and compensation, and for the regulation of apprentices, and as to a license fee. (p. 894.)

CONSTITUTIONAL LAW—Local and Class Legislation.—A statute to regulate the practice of barbering is not local, class, or special legislation simply because it divides the communities of the state into classes for each of which different regulations are provided, when the statute operates equally upon all barbers coming within such respective classifications. (p. 897.)

CONSTITUTIONAL LAW—Local and Class Legislation.—Although a statute regulating the practice of barbering provides for the issuance of a certificate without examination upon the payment of a small fee to all barbers then carrying on business in certain cities, while barbers subsequently coming into such cities are required to stand an examination and pay a larger fee, it is not void as discriminating against one class of citizens in favor of others, because such law operates equally upon all who fall under the operation of its provisions. (p. 900.)

CONSTITUTIONAL LAW—Application of Statute.—A statute which by its provisions clearly applies to all incorporated cities and towns applies to all such cities and towns whether incorporated at the time of the passage of the statute or thereafter. (p. 900.)

CONSTITUTIONAL LAW—Wisdom of Statute.—Courts will not pass upon the wisdom or the sufficiency of the reason for the provisions of a statute which is not in conflict with some constitutional provision. Such questions are for the legislature alone. (p. 901.)

Saunders & Bassett, for the appellant.

H. Kimball, prosecuting attorney, and R. M. Barnhardt, for the state.

¹⁹² MOUNT, J. Appellant was convicted of practicing the occupation of a barber without having first obtained a certificate of registration entitling him to practice such occupation. The only questions raised which may be considered on this appeal are questions which go to the constitutionality of the act of 1901 (Laws 1901, p. 349, c. 172). It is claimed (1) that the act is repugnant to section 19, article 2 of the constitution of this state, which provides that "no bill shall embrace more than one subject, and that shall be expressed in the title"; (2) that the act is repugnant to the fourteenth amendment to the constitution of the United States, and especially to section 12, article 1, of the constitution of this state, which is as follows: "No law shall be passed granting to any citizen, or class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

1. The title of the act is as follows: "An act to regulate the practice of barbering, and licensing of persons to carry on such practice, and providing punishment for its violation." The act defines the practice of barbering, and provides that it shall be unlawful for any person to follow the occupation in any incorporated city or town without first having obtained a license therefor. It then provides for the appointment of a board of examiners; defines their terms of office, their headquarters, compensation, ¹⁹³ and their duties; then prescribes the fees for certificates, and also the qualifications of barbers; provides for the issuance of certificates to qualified persons authorizing them to practice barbering; provides for apprentices; and also specifies the causes for which the board of examiners may revoke certificates issued and reissue the same; lastly, provides a penalty for practicing the occupation in certain districts without a certificate therefor, and makes certain acts of barbers in the cities of the first, second, and third classes misdemeanors. Appellant argues that the title does not embrace the appointment of the board of examiners, or the duties of the board, or the compensation of its members, or refer to apprentices of barbers or to the subject of a license fee. But we think the title is sufficient to cover all these provisions. They are all intimately and

naturally connected with the subject matter of the act. This court, in the case of *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735, where the title of an ordinance was "An ordinance to license and regulate certain trades and occupations in the city of Seattle, providing penalties for the violation thereof, and repealing all ordinances inconsistent therewith," held that a provision under this title, making it unlawful for a pawnbroker to transact his business without first procuring a license therefor, was within the scope of the title. That case, it seems to us, was a much stronger case against appellant than the one under consideration. There, after quoting approvingly from *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, and *Cooley on Constitutional Limitations*, sixth edition, page 172, it was said: "But a title, to be sufficient, need not be an index to the provisions of the ordinance. It is sufficient if it gives such notice of its object as to reasonably lead to an inquiry into its body. 'The purpose of the title is only to ¹⁹⁴ call attention to the subject matter of the act, and the act itself must be looked to for a full description of the powers conferred': *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645." See, also, *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376. Under the rule therein announced, the title of the act in question here is sufficient.

2. It is next argued that the act is void because "local, class, special and discriminating legislation"; local, because it applies only to incorporated cities and towns, and special and discriminating, because it does not affect all barbers alike. The act provides as follows:

"Section 1. It shall be unlawful for any person to follow the occupation of barber in any incorporated city or town in this state, unless he shall have first obtained a certificate of registration as provided in this act; provided, however, that nothing in this act shall apply to or affect any person who is now engaged in such occupation except as hereinafter provided."

"Sec. 9. Every person now engaged in the occupation of barber in cities of the first, second or third class, in this state shall, within ninety days after the approval of this act, file with the secretary of said board an affidavit setting forth his name, residence and length of time during which and the places where he has practiced such occupation, and shall pay to the secretary of said board one dollar, and a certificate entitling him to practice said occupation for one year shall thereupon be issued to him.

"Sec. 10. To obtain a certificate of registration under this act, any person excepting those mentioned in section nine shall make application to said board, and shall pay to the secretary an examination fee of five dollars, and shall present himself at the meeting of the board for examination of applicants. The board shall examine such person, and being satisfied that he is above the age of eighteen years, of good moral character, free from contagious or infectious disease, has studied the trade for two years as ¹⁹⁵ an apprentice under or as a qualified and practicing barber in this state, or other states, and is possessed of the requisite skill to properly perform all the duties, including his ability in the preparation of the tools used, shaving, cutting of the hair and beard and all the various services incident thereto, and has sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of his trade, his name shall be entered by the board in a register hereinafter provided for and a certificate of registration shall be issued to him authorizing him to practice said trade in this state, for one year. All certificates shall be renewed each year, for which renewal a fee of fifty cents shall be paid. All persons making application for examination under the provisions of this act shall be allowed to practice the occupation of barber until the next meeting as designated by said board."

"Sec. 15. Any person practicing the occupation of barber in any city of the first, second or third class in this state, without first having obtained a certificate of registration as provided in this act, or falsely pretending to be practicing such occupation under this act, or who uses, or allows towels to be used on more than one person before such towels have been laundered; or razors, lather, or hair brushes on more than one person before the same shall have been sterilized or in violation of any of the provisions of this act, and every proprietor of a barber-shop who shall willfully employ a barber who has not such a certificate shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or both."

The right of the legislature to enact laws for the promotion of health is now universally sustained as a police regulation: Cooley on Constitutional Limitations, 6th ed., p. 720; Fox v. Territory, 2 Wash. Ter. 297, 5 Pac. 603; State v. Carey, 4 Wash.

424, 30 Pac. 729; *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376; *State v. Zeno*, 79 Minn. 80, 79 Am. St. Rep. 422, 81 N. W. 748; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218; *State v. Wilcox*, 64 Kan. 789, 68 Pac. 634. Under this rule the legislature of this state has enacted laws for the regulation of the occupations of physicians, dentists, pharmacy, and other occupations.

It is also well settled in this state that when a law operates equally upon all who fall under its operation, even though they constitute a class, the law is upheld: *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. 603; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419, 46 Pac. 650; *State v. Considine*, 16 Wash. 358, 47 Pac. 755; *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372. Mr. Cooley, in his work on *Constitutional Limitations*, sixth edition, page 480, says: "The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable ¹⁹⁷ to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens."

The act under consideration in effect classifies the state into three districts: 1. All cities of the first, second, and third classes; 2. All other incorporated cities and towns; 3. All towns or places not incorporated. All barbers conducting their occupation in the latter class are exempted from the provisions of the act. All barbers in the second class, except those en-

gaged at the time the act took effect, must pass an examination and pay five dollars for a certificate. All in the first class at the time the law took effect were entitled to a certificate authorizing them to continue the practice of their occupations upon filing an affidavit and paying one dollar therefor. All thereafter within the first and second classes, desiring to barber, must pass an examination and pay a fee of five dollars. All barbers in the first class are subject also to certain restrictions as follows: They must not use the same towel on two different persons without having the same laundered. They must sterilize their tools before using them the second time, etc. Barbers as a class throughout the state are undoubtedly subject to different rules and restrictions under this act, but these restrictions depend upon the district in which they carry on their occupation. All who carry on their occupation in the same district are subject to the same laws and are treated alike. No privilege or immunity is granted to one which upon the same terms does not belong equally to all. Barbers as a class have no greater rights or privileges under the constitution than citizens as a class. If citizens may be classified into districts, and different regulations applied to citizens residing in one district from those residing in another, it certainly follows that a class of citizens such as barbers residing in one district may be governed by regulations different from ¹⁹⁸ those governing barbers residing in another district. It cannot be doubted that the legislature may authorize by general act all cities of the first, second, and third classes, and all incorporated towns within the state, to regulate the occupation of barbering therein, or regulate any occupation affecting the health and morals of the community; that any such cities of the first class under such authority might properly pass an ordinance regulating the occupations. Cities of the second and third classes or incorporated towns, under such authority might also each pass similar acts, but with different requirements and different charges for licenses, and no one would argue that, because a license sufficient for the costs of maintaining the regulation, requiring them to pass an examination before a qualified board before they are permitted to practice their occupation, and requiring them to sterilize their towels and tools before using them, and other reasonable regulation of barbers, making the same requirements apply to all barbers within the city limits, requiring them to pay the requirements in different cities were different, or the fees for licenses were different in different towns, or because

certain towns had not regulated the occupation at all, the act was inimical to the constitutional provisions under discussion, for the reason that all barbers throughout the state were not placed upon the same terms. If the state may authorize cities and towns to make these regulations, the state may make them in the first instance, because cities and incorporated towns of the state are creatures of the state, and may be regulated by general law as well as by ordinance. For these reasons, we think the act is not repugnant to section 12 of article 1 of the constitution of this state, nor to the fourteenth amendment to the constitution of the United States: See *Missouri v. Lewis*, 101 U. S. 22; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218, *State v. 199 Zeno*, 79 Minn. 80, 79 Am. St. Rep. 422, 81 N. W. 748; *State v. Bair*, 112 Iowa, 466, 84 N. W. 532; *State v. Creditor*, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346.

Two cases from the state of New Hampshire are cited and relied upon by appellant, viz.: *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878, and *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194. These two cases arose under the same act. One related to the practice of dentistry, and the other to the practice of medicine. The act under which the cases were prosecuted provided that physicians and dentists "who have resided and practiced their professions in the city or town of their present residence during all the time since January 1, 1875," were not subject to the provisions of the act requiring a license. All others were required to take a license. Those having a diploma were required to pay one dollar; those taking an examination, five dollars. The act divided residents of the same town into two classes: "1. Those who have; and 2. Those who have not resided continuously in some one town of the state during the four years begun January 1, 1875. The latter class must, while the former need not, pay five dollars or one dollar as the case may be, for a license, in order to continue their business." And it was held in those cases that this was a discrimination between physicians, and also between dentists residing in the same town and similarly situated at the time the act took effect. These cases are criticised in *State v. Bair*, 112 Iowa, 466, 84 N. W. 532, but if the New Hampshire cases are correct they are not authority for appellant in this case, because the act under consideration here makes no such discrimination as was made by the New Hampshire law. All barbers in the same districts in this state at the time the act took effect are treated exactly alike under the act. But the

New Hampshire court, in *State v. Pennoyer*, said: ²⁰⁰ "If all physicians alike, as well as those who have as those who have not resided and practiced during the specified period in a single town, were required to procure and pay for a license, it may be that the statute would be open to no constitutional objection: *State v. Green*, 112 Ind. 462, 14 N. E. 352; *State v. Dent*, 25 W. Va. 1"—thereby noting the distinction between those cases and the one at bar.

It is also argued that the act discriminates against appellant because it provides that all barbers carrying on their occupation in cities of the first, second, and third classes at the time the act took effect are not required to pass an examination; but each may instead file an affidavit within ninety days, setting forth his residence, occupation, and pay one dollar, when a certificate shall be issued to him; while those coming to such cities thereafter are required to pass an examination and pay five dollars for a certificate. This contention was decided against the position of appellant by the territorial court in *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. 603. We are satisfied with the rule there announced.

It is also argued that the act applies only to cities of the state incorporated at the time of the passage of the act, and will not apply to those hereafter to be incorporated. We find no reason for this contention. The act clearly applies to all incorporated cities and towns, whether incorporated now or hereafter: *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218.

Other questions, going more to the wisdom of the act, are presented by appellant, but these questions are for the legislature and not for the court. For example, it is urged that the act is for the protection of the health of the people of the state; that the people outside of cities and incorporated towns are as much entitled to be treated by qualified ²⁰¹ and cleanly barbers as those people who live in incorporated cities and towns; that there is no good reason why barbers in an incorporated city or town below the third class should be exempted from the provisions of the act, and be permitted to continue their occupation, while those in cities of the first, second, and third classes at the time the act went into effect should be required to file an affidavit and obtain a license before being permitted to continue their occupation; and also that barbers in cities of the first, second, and third classes are liable to a fine for failure to use clean linen or sterilize their tools, while barbers outside of such cities may use dirty linen and unsterilized tools. These

and similar questions are all questions for the legislature to pass upon. There may be some good reason why barbers in larger cities should be more careful and cleanly than barbers in smaller places, and why barbers becoming such subsequent to the passage of the act should pass an examination before being permitted to practice their occupation, while those engaged at the time of the passage of the act should not, and why the fee for a license in one place may be higher than in another. Courts will not pass upon the sufficiency of the reason for the provisions of an act which is not in conflict with some constitutional provision. Cooley, in his work on Constitutional Limitations, sixth edition, 201, states the rule as follows: "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency, with the law-making power."

202 We think the act in question is not repugnant to any provisions of the constitution of this state or of the United States.

The judgment is therefore affirmed.

Fullerton, C. J., and Dunbar and Anders, JJ., concur.

The Legislature is Competent to prohibit persons practicing the calling of a barber without first obtaining a license or certificate of registration: State v. Zeno, 79 Minn. 80, 79 Am. St. Rep. 22, 81 N. W. 748. And it may also prohibit the keeping open of barber-shops on Sunday: State v. Sopher, 25 Utah, 318, 95 Am. St. Rep. 845, 71 Pac. 482. For arbitrary classifications in exacting license fees from persons following particular vocations, see State v. Michell, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481, and cases cited in the cross-reference note thereto.

NELSON v. McLELLAN.

[31 Wash. 208, 71 Pac. 747.]

NEGLIGENCE TOWARD CHILDREN — Explosives.— The placing of dynamite upon a vacant lot, insufficiently covered and in such position as to be readily discovered and easily tampered with by, and to form an object of attraction to, children accustomed to play upon or pass over such lot is negligence which may cause responsibility for injury to such children from such explosive. (p. 903.)

EXPERT EVIDENCE, When Competent Must Go to the Jury as any other competent testimony and the jury is the sole judge of the weight of such evidence. (p. 905.)

Roberts & Leehey, for the appellant.

Preston, Carr & Gilman and J. W. Rayburn, for the respondent.

200 DUNBAR, J. The respondent, in company with another boy, was playing on some vacant lots in the city of Seattle, and, observing a box which was not altogether covered, investigated the same, and found in it some sticks of explosive powder known as "Judson dynamite No. 2." According to the testimony of the boys, these sticks of dynamite were already prepared for explosion. They took one of them (thinking it was a large fire-cracker, it being about six inches long) to a stump, lit a match, and applied it to the fuse. The dynamite exploded, and the respondent was injured thereby, losing one of his eyes. The dynamite was exploded by the boy who was playing with the respondent. It was on the Fourth of July, and they were out on the lots aforesaid exploding fire-crackers. Action was brought for damages, and a judgment of three thousand dollars obtained. From such judgment this appeal is taken.

The complaint alleges, among other things, that the defendant was under contract with the city of Seattle to improve Denny way, and other ways, avenues, and streets of the city; that, while engaged in the prosecution of the work, he used an explosive powder known as "Judson dynamite No. 2" (setting forth the character of the powder, and the care and skill necessary to handle it); that, without the knowledge or consent of the plaintiff or the parents of the plaintiff, and without leave or license from the owner of the premises on which the powder was stored, he wrongfully, carelessly, negligently, and improp-

erly did store more than twenty sticks of said powder, and did suffer it to be and remain on said premises on the fourth day of July, 1899, badly, insufficiently and deficiently covered, and in such position as to be readily discovered and easily tampered with by children playing upon or passing ²¹⁰ over said lot; that the plaintiff and his companion were boys of tender years, and wholly ignorant of the dangerous properties of said powder; that while playing upon said lot they found and discovered a box placed with its contents upon said lot by the defendant, containing a quantity of dynamite aforesaid, said box having been there placed by the defendant negligently, insufficiently, and deficiently covered; that the said children, having found the box as aforesaid, prompted by childish curiosity opened the same and found therein the said sticks of powder; that thereupon the said William Kiger (the boy who was accompanying respondent), without fault or negligence on his part, and without fault or negligence of this plaintiff, took from said box, in plaintiff's immediate presence, one of the sticks of powder aforesaid, and, supposing it to be some kind of a fire-cracker, such as that in common use on that anniversary, ignited the fuse attached thereto, whereupon the said stick of powder exploded with great force, and by the explosion thereof the injury set forth in detail was caused. Damages were claimed in the sum of twenty thousand dollars. The complaint contains the other ordinary allegations in such cases. A demurrer was interposed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and the overruling of the same is appellant's first assignment of error.

We think, if the powder was placed on vacant city lots, upon which children are accustomed to play, in the manner described by the complaint, that it is negligence on the part of the person so depositing it, and, in the absence of contributory negligence—which does not appear from the complaint—responsibility for damages will attach. There is a great diversity of decision upon cases of this character, the particular circumstances of each case generally controlling. ²¹¹ But, without entering into an analysis of the many cases which might be cited, we think the cases cited by the respondent sustain the complaint in this case. *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, it seems to us, is a parallel case. There the defendant or its servants negligently placed and left on the track an unexploded signal

torpedo, at a place which had been used as a crossing. The torpedo was picked up by a boy of nine years of age, and carried by him into a crowd of boys near by. Being ignorant of its explosive character, he attempted to open it, the torpedo exploded, and the plaintiff, a boy of ten years of age, was injured by the explosion. It was held under this state of facts that the negligence of the company's servants was the proximate cause of plaintiff's injury. The only difference between that case and this is that in this case there had been an attempt to conceal the powder by burying it out of sight. But, if the testimony of the respondent and the witness Willie Kiger is true, the box was not completely buried, and nothing would appeal more strongly to the natural curiosity of a boy seven years old than a box in such a place partly disclosed. We think the complaint stated a cause of action and there was no error committed in overruling the demurrer to the same.

It is strongly contended that the court erred in denying defendant's motion for a nonsuit, in denying the challenge of defendant to the sufficiency of the evidence, and in refusing to render judgment in favor of defendant against plaintiff upon the evidence. The evidence was contradictory, and if the jury believed the testimony of the witnesses for the respondent—and the credibility of the witnesses was for the jury alone to determine—there was sufficient testimony to sustain the judgment.

The same may be said of the fourth assignment, that ²¹² the court erred in holding that the evidence showed that the powder was stored and kept in such a manner as to be rendered particularly attractive to children. We think that the instructions of the court generally stated the law fairly, and as favorably to the appellant as it was entitled to, both in relation to the independent agency of William Kiger, the boy who exploded the powder, and in every other particular, except instruction 28, which we will hereafter notice, and that no error was committed by the court in refusing instructions offered by the defendant, as such instructions, so far as they were justified by the law, had already been given by the court in its direct instructions. But the court instructed the jury as follows: "I charge you further, that the testimony of expert witnesses is proper evidence to be received and considered by you, and is entitled to such weight with you as in your judgment as fair-minded men it is entitled to, but it is not of as high grade

as evidence—is not as good evidence of a fact, as the testimony of a credible witness or witnesses who testify to having seen the fact itself occur. In other words, the testimony of an eye-witness to an occurrence, whom you find to be a credible witness, is entitled to more weight with you than that of an expert witness who did not see the occurrence, but testifies only to his opinion in the matter.”

The giving of this instruction is assigned as error, and, while it is contended by the respondent that such instruction embodies a proper statement of the law, and some cases are cited to sustain the view, yet this court has decided that expert testimony, being competent testimony under the law, must go to the jury as any other testimony in the case goes, and that the jury is the sole judge of the weight of such testimony, and that the court errs when by its instruction to the jury it discriminates in any way against the weight of such testimony. Such was the ruling ²¹³ of this court in *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721, and *In re Blake's Estate*, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827.

For this error, the judgment will be reversed, and the cause remanded for a new trial.

Fullerton, C. J., and Hadley, J., concur.

Mount, J., concurs in the result.

ANDERS, J. While I have no doubt that the instruction of the court, as set forth in the foregoing opinion, was erroneous, I am also of the opinion that appellant's motion for a nonsuit and for a judgment should have been sustained, on the ground that the evidence failed to show negligence on the part of appellant.

The Liability of Property Owners to Infant Trespassers is discussed in the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416-426. The general rule is often laid down that the owner of private grounds is under no obligation, in the absence of willful or wanton negligence, to keep them in a safe condition for the benefit of trespassers, whether infant or adult, who come upon them, not by invitation express or implied, but for their own purposes, to gratify their pleasure or curiosity: *Uthermolen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, and cases cited in the cross-reference note thereto; *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, and cases cited in the cross-reference note thereto; *McCaughna v. Owosso etc. Electric Co.*, 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73. As to the liability of a railway company to a child who intermeddles with torpedoes along its track, see *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4

Am. St. Rep. 507, 12 N. E. 451; *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754; *Hughes v. Boston etc. R. R.*, 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070.

Expert Evidence, as to its weight and credibility, is generally for the jury alone to consider: *State v. McCullough*, 114 Iowa, 532, 89 Am. St. Rep. 382, 87 N. W. 503; *Estate of Blake*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135, and cases cited in the cross-reference note thereto.

LUND v. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

[31 Wash. 286, 71 Pac. 1032.]

MUNICIPAL CORPORATIONS—Obstruction of Streets—Nuisance.—The closing of a street by one to whom a municipal corporation has delegated the right to close it for the purpose of making an improvement therein does not constitute a nuisance, so long as reasonable care and diligence are exercised in prosecuting the work. (p. 908.)

MUNICIPAL CORPORATIONS—Liability for Obstructing Streets.—Unavoidable delay in the construction of a street improvement caused by inability to procure necessary material ordered from the best equipped plant in the country whose delay in filling the order is caused by strikes and labor troubles, does not render the person who has undertaken to construct the improvement liable for the continued obstruction of the street, in the absence of a showing that such material could have been obtained at an earlier date from some other source. (p. 908.)

MUNICIPAL CORPORATIONS—Obstruction of Street—Liability.—A corporation or person to whom a municipal corporation has delegated the right to close a street for the purpose of making an improvement therein is liable for damages arising from closing the street only when the city would be thus liable. (p. 910.)

TRIAL.—Instructions to the jury to ignore a statement of counsel as to certain facts creating a liability not in issue between the parties is not erroneous but proper. (p. 910.)

MUNICIPAL CORPORATIONS—Obstruction to Streets—Damages—Evidence.—An abutting owner who sues for injury to his business arising from an unreasonable closing of a street, is properly limited to a period of three months after the street is reopened, in showing the difference in profits between the times when the street was closed and when it was open. (p. 911.)

MUNICIPAL CORPORATIONS—Obstruction of Street—Evidence.—Defendant, in an action to recover for an obstruction to a street for an unreasonable time in making an improvement, is entitled to show under a general denial, the condition of the coal and steel markets at the time for the purpose of showing that the delay in obtaining material with which to complete the improvement was caused by circumstances over which he had no control. (p. 912.)

Hamblen & Lund, for the appellant.

W. H. Thompson and M. J. Gordon, for the respondent.

²⁸⁸ HADLEY, J. The respondent railway company applied to the city council of the city of Spokane for leave to construct its line of railroad along and across certain streets and alleys of said city. An ordinance granting said privilege was passed and approved. Washington street, in said city, extends upon both sides of the Spokane river, the portions of the street separated by the river having been connected by a wooden bridge at the time of the passage of the ordinance above mentioned. By the terms of said ordinance a steel bridge was required to be constructed, and the plans called for certain changes in the grade of the street. The respondent entered upon the work of changing said grade and constructing said bridge as required by the ordinance. In the prosecution of the work it became necessary to close up the street at the place where it crosses the river, and the traveling public were thereby prevented from crossing there. The street was a much traveled one, and the work of construction upon the bridge occupied more than a year, during which time no travel was permitted to cross the river at that place. Appellant was the owner of real estate upon said street situate a short distance from the end of the bridge. The premises were, however, accessible from another direction. For a time before the street was closed at the bridge crossing appellant had been conducting a hotel, with bar-room attached, upon said premises. He claims that the interference with travel across the river upon that street greatly affected his business, and reduced the profits thereof, to his serious damage. He brought this suit to recover from respondent for such alleged damages. He alleges that by the exercise of reasonable and proper diligence in the making of said improvements the respondent ²⁸⁹ might have constructed said bridge, and opened it for public use and travel, within three months from the time of commencing the work, and that said period of three months was a reasonable time within which to complete the same. He further alleges that, if said bridge had been constructed within reasonable time, the profits of his business would have been at least twenty dollars per day greater; that in consequence of the unreasonable delay travel was diverted from his premises; and that he has been damaged in the sum of five thousand dollars. The material allegations of the complaint are denied by the answer. A trial was had before a jury, which resulted in a verdict for respondent. Appellant moved for a new trial, which was denied. Judgment was en-

tered upon the verdict that appellant take nothing by his suit, and from said judgment he has appealed.

Error is assigned upon certain instructions in relation to the question of reasonable time for the construction of the bridge. The criticism urged is that the case was submitted to the jury upon the theory that, in order for appellant to recover, it was necessary to show want of care and diligence on the part of respondent. It is insisted that such a theory is a wrong conception of the case, and that the real question is whether the facts concerning the street obstruction constituted a nuisance, and, if so, that respondent cannot be relieved from liability, though the work of construction may have been done in the most approved manner. It is further urged that the mere fact that injurious results were occasioned by the work is sufficient, if a nuisance existed, and that care on the part of respondent is not an element in the case. It appears to us that the theory of counsel and that of the court both lead to the same result. The city had the undoubted ²⁹⁰ right to close the street for the purpose of building the bridge, and the obstruction occasioned thereby could not within a reasonable time have been classified as a nuisance. The city delegated the respondent company to make the improvement, and thereby vested it with authority to exercise the privileges belonging to the city in the premises. Therefore, as long as respondent exercised reasonable diligence, the obstruction could not constitute a nuisance. But, if want of care and diligence existed, then the obstruction was no longer a necessity, and became a nuisance. It follows that the instructions criticised correctly stated the law of the case.

It is assigned that the court erroneously instructed the jury to the effect that if the obstruction of the street was continued by reason of the failure of the steel company to furnish the necessary steel, and not because of any lack of diligence on respondent's part, then appellant could not recover. The evidence showed that respondent had promptly contracted with the American Bridge Company to furnish the structural steel required by the plans approved by the city for use in this bridge. That company was shown to be probably the best equipped one in the entire country. The testimony was not contradicted that such material as was required for this bridge is not kept in stock by any company, but must be manufactured under special order, according to plans submitted. There was no showing in the evidence that the manufactured material could

have been procured at an earlier date from any other source. There was also evidence to the effect that the delay of the manufacturing company was due to strikes and labor troubles, and that element was also made a feature of the instructions of the court in the connection now under consideration. The respondent had ²⁹¹ been delegated by the city to do this work, and no time was specified within which it should be done. It was therefore under obligation to finish the structure within a reasonable time. It applied to probably the best recognized source for obtaining the manufactured material—a material which respondent itself was not prepared to manufacture, and which must have been known to the city at the time it delegated respondent to do the work. There was testimony that the work was forwarded with dispatch, with the exception of that portion thereof which required the steel, and that the delay was really due to the failure of that material to arrive. Appellant urges that respondent cannot be excused for any delay beyond the reasonable time required for the actual constructive work, and that the only excuse that can be offered for failure to perform a public duty must be the act of God or the public enemy. Such a harsh rule, applied to a case of this kind, cannot be the law. Appellant invokes the rule adopted in *Herrman v. Great Northern Ry. Co.*, 27 Wash. 472, 68 Pac. 82, which is to the effect that one cannot evade liability because of the neglect of another to whom certain duties have been delegated by him, for the reason that the primary liability rests with the one who has delegated the neglectful party. There, however, the duty neglected by the delegated party was such as, in its nature, could have been easily discharged by the one primarily liable, and the rule stated is reasonable and right in such cases. But here the respondent could not manufacture the steel, and was compelled to depend upon another, who was prepared for such skillful work. It is manifest, in the nature of things, that great expense and skillful preparation are required for such manufacture. The evidence shows that but few are thus engaged, and ²⁹² it follows that those who wish the manufactured product may, without any neglect of their own, be delayed. Under such unusual and really compulsory conditions, liability should not be lodged against one who has himself been diligent. Such is the effect of the instructions criticised under this assignment of error. Respondent's obligation, as we have said, was to complete the work within a reasonable time, and what is a reasonable time must depend upon the circumstances of each particu-

lar case. In this case, under the evidence, the delay occasioned by the manufacturing company was an important circumstance. "If it is proper to attempt any definition of the words 'reasonable time,' that given by Chief Baron Pollock may be suggested—namely, that 'a reasonable time means, as soon as circumstances will permit'": 2 Thompson on Trials, sec. 1531.

The respondent stood in the place of the city, and we should inquire under what circumstances the city would have been liable. "It may be stated as a general rule, that if the legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful; if damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it": 8 Am. & Eng. Ency. of Law, 2d ed., p. 697.

The city as a subdivision of the state, was empowered by the legislature to maintain streets and to erect bridges where required for necessary street purposes. That power in this instance was delegated to respondent, and the rule above stated as applicable to the city itself must apply to respondent. It is a recognized rule that the right of ²⁹³ transit in the use of a highway is subject to such incidental, temporary obstructions as necessity may require; and "these are not evasions of, but simply incidents to, or rather qualifications of, the right of transit; and the limitation upon them is, that they must not be unnecessarily and unreasonably interposed or prolonged": *Clark v. Fry*, 8 Ohio St. 358, 374, 72 Am. Dec. 590. See, also, *Shepherd v. Baltimore etc. R. R. Co.*, 130 U. S. 426, 9 Sup. Ct. Rep. 598; *Coyne v. Mississippi etc. Boom Co.*, 72 Minn. 533, 71 Am. St. Rep. 508, 75 N. W. 748; *Taylor v. Baltimore etc. R. R. Co.*, 33 W. Va. 39, 10 S. E. 29; *Stewart v. Havens*, 17 Neb. 211, 22 N. W. 419; 2 Thompson's Commentaries on Negligence, sec. 1368.

Under the above authorities, the city itself would not have been liable if the work had been necessarily delayed without any neglect of its own, and if the delay had been solely due to the failure of the manufacturer to furnish material of such unusual character as the product of a limited field of manufacture. The same was true of respondent, and we think the instructions were not erroneous.

It is urged that the court erred in instructing the jury not to consider any statement of counsel relative to the liability of the American Bridge Company to reimburse respondent for any

sum it may be required to pay on account of the delay occasioned by the bridge company. We think the instruction was correct. The bridge company was not a party to the case and the question of its liability to respondent was not an issue for the jury to consider. Moreover, the remarks of counsel upon this subject are not shown in the record, and we cannot say ²⁹⁴ that they may not have been such as warranted the instruction.

It is further assigned that error was committed in instructing the jury that the respondent would be liable under the same circumstances as would make the city liable, for the reason, as alleged, that the court failed to state under what circumstances the city would be liable. This assignment is not well taken, for the reason that in a previous instruction the court had clearly stated the conditions which would make the city liable. Under the well-known rule that all the instructions must be considered together, the particular instruction criticised was not erroneous.

Error is predicated upon the court's refusal to permit appellant to show the amount of receipts from his business for a period of more than three months after the completion of the bridge and the opening of the street. The purpose of this testimony was to endeavor to establish the amount of loss to appellant's business by comparison between the monthly receipts after the opening of the bridge and those during the time it was closed. It was not unreasonable that some limit should be placed upon the scope of that class of testimony. What that limitation should be, was largely a matter for the discretion of the trial court. Other influences than those arising directly from the opening of the street may have operated to affect the amount of receipts as time progressed. We think there was no manifest abuse of discretion.

Error is urged that the court permitted respondent to introduce testimony as to the condition of the steel and the coal markets, for the alleged reason that it was incompetent, under the answer, which was a general denial. That testimony tended to show that the delay was occasioned ²⁹⁵ by circumstances over which respondent had no control, and therefore negatived the theory of negligence and want of care on its part. This may be done under the general denial, in an action based on negligence, which, as we have already said, this action was:

14 Ency. of Pl. & Pr. 344.

The last error assigned is upon the denial of the motion for new trial. We find no error in the conduct of the trial, and, the jury having passed upon the evidence, the verdict will not be disturbed.

The judgment is affirmed.

Mount, Dunbar and Anders, JJ., concur.

Fullerton, C. J., not sitting in this case.

The Right of Transit of the Public in Streets is subject to such incidental, temporary, or partial obstructions as manifest necessity require; but these obstructions must not be necessarily and unreasonably interposed or prolonged: *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 358; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709.

AHERN v. AHERN.

[31 Wash. 334, 71 Pac. 1023.]

HOMESTEADS on Public Lands—Community Property.—If the equitable title to a homestead is vested in the community, and the legal title is not obtained until after the death of one of the spouses, the legal title then vests in the community and the heirs of the deceased spouse are entitled to one-half thereof. (p. 915.)

COMMUNITY PROPERTY.—If an **Inchoate Title to Land** has its inception during the existence of the community, the legal title acquired by a surviving spouse after the dissolution of the community by death vests in the community, and the whole becomes community property. (p. 915.)

W. W. Zent, and A. E. Gallagher, for the appellant.

O. R. Holcomb, for the respondents.

335 DUNBAR, J. This action was brought by appellant against respondents to quiet title to two quarter sections of land in Adams county, Washington. The court found in favor of appellant as to one quarter section, known as the railroad land, and found that the respondents were half owners of the other quarter section of land, known as the homestead of appellant. The appeal is from the finding of the court in relation to the homestead. The stipulated facts are that appellant and Bridget Ahern were husband and wife for about thirty-five years prior to December 31, 1894, on which last day Bridget Ahern died intestate, leaving the respondents, together with the

appellant, as her surviving heirs at law. On the twenty-first day of May, 1888, appellant made a homestead entry on the lands in question under the homestead laws of the United States, and he and his wife lived thereon thereafter, and complied with the United States laws, rules, and regulations relating to homesteads, until the wife died as aforesaid. Appellant did not make application to make final proof on said homestead for several months after the death of his wife, but after her death did make final proof, and received his final receipt of said homestead entry for said land on January 27, 1896, and thereafter, on July 31, 1896, received a patent of that date from the United States, conveying said homestead land to him. As conclusions of law, the court found the respondents were the owners of an undivided one-half interest in said ³³⁶ homestead, and that the appellant was the owner of the other undivided one-half interest, and entered a decree adjudging that appellant was not entitled to have the title to said land, except one-half thereof, quieted in him, as against the respondents. The appeal is from such decree.

There are two questions involved in this case, which are raised by this appeal: 1. Do the laws of this state apply to such a conveyance? And 2. If they do, is such property community property? It is the contention of the appellant that the cause involves a federal question, and necessitates a construction of the homestead laws of the United States; that the state laws cannot control the title to lands which are acquired under the homestead act, and, further, that, if it be decided that they do, this particular land is not community property under the provisions of the community property laws of the state. Both these questions have been decided by this court against the contention of the appellant. In *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, it was decided that where the equitable title was vested in the community, and the legal title was not obtained until after the death of one of the spouses, the legal title also then vested in the community. On the second proposition, it was there also decided that, within the intent of our laws relating to community property, such land was, in effect, taken by purchase, by reason of the settlement and improvements thereon, in which the wife, as well as the husband, participated, and consequently that the land was community property. To the same effect is *Brazee v. Schofield*, 2 Wash. Ter. 209, 3 Pac. 265, and *Roeder v. Fouts*, 5 Wash. 135, 31 Pac. 432. It is admitted by appellant that such has been the

holding of this court, but he insists that such holdings were erroneous, and ³³⁷ asks the court to adopt the rule contended for by him—that the laws of the state have no application to lands secured under the homestead act—and, further, that such property is not community property under the provisions of the state community property law. If the question were one for present determination, we could but arrive at the same conclusion as before. In *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811, we held that a homestead settled upon and improved by a woman before marriage, who continued to reside there, together with her husband, after her marriage, and to whom a patent was issued therefor after final proof was made, was the separate property of the wife. This decision was rendered upon the theory that, if either spouse before the marriage had acquired an equitable right to property which was perfected after marriage, the status of the property would follow the right of the spouse who had an equitable interest in the property before marriage. The same reasoning would compel the holding in this case that the property was the property of the wife, she being one of the community at the time the provisions of the law were complied with, which compliance secured to the community the right to obtain title to the property. In the case just cited, after laying down the rule announced above, it was said: "But the rule also seems to prevail in favor of the community as to the title initiated during the community and perfected after the dissolution of the marriage."

As sustaining this rule, see, also, *Caruth v. Grigsby*, 57 Tex. 259; *Hodge v. Donald*, 55 Tex. 344; *Carter v. Wise*, 39 Tex. 273; *Cannon v. Murphy*, 31 Tex. 405; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Yates v. Houston*, 3 Tex. 433.

We know of no cases holding to the contrary, and, even ³³⁸ conceding without deciding, that a construction of the homestead laws is necessary, it seems to be the doctrine of reason and justice that, where the community has done all that the law requires it to do, the equitable title vests; that it is the doing of the thing required, and not the proof of the doing, which meets the requirements of the law; that the proof is only evidentiary matter which establishes the fact which already existed. In addition to this the supreme court of the United States has uniformly held that the right to a patent, once vested, is treated by the government, when dealing with the public lands, as equivalent to a patent issued; that, when in fact the patent does issue, it relates back to the inception of the right

of the patentee; and that before such title passes, but after the acquiring of the right to the title, the government simply holds the title in trust for the benefit of the owners of the equitable title. So that, when the provisions of the homestead law had been complied with by this community, the equitable title vested in the community, and, when the legal title passed from the government of the United States, it related back to the inception of the right of the patentee.

On the other question involved we are equally satisfied that, under the laws of the state, this land was community property. It is said in 6 American and English Encyclopedia of Law, second edition, page 317, in discussing inchoate titles, that the doctrine of relation, whereby a title takes effect as of the time of the first act initiating it, is often invoked to determine, as between the community and one of the spouses, whether the property is separate or falls into the community; that, if either spouse before the marriage has acquired an equitable right to property which is perfected after the marriage, the property is separate, and that the same rule will prevail ³³⁹ in favor of the community as to a title initiated during the community, and perfected after the dissolution of the marriage; that in the first case the title takes effect as of a time before the community (the property is therefore separate), and in the other as of a time during the community (it is therefore community property). It will be observed that separate property is defined by the statute, and the law provides that all other property acquired after marriage, by either husband or wife, or both, is community property. From these provisions of the law limiting the separate property by description, and proclaiming all other property not so limited and described as community property, this court has decided, in accordance with the elementary idea running through the community property system of laws, that all property acquired after marriage is presumptively community property. Certainly it is by the combined efforts of the husband and wife that title to homestead lands is acquired. The homestead law contemplates this, for, in the case of a man with a wife, it becomes necessary, in order to prove a residence, to show that the wife or family resided upon the homestead for the period during which residence was acquired.

We think there was no error committed by the court in holding the land in question to be community property, and the judgment is therefore affirmed.

Fullerton, C. J., and Mount, Anders, and Hadley, JJ., concur.

**WHETHER REAL PROPERTY GRANTED BY A GOVERNMENT
TO A CITIZEN IS SEPARATE OR COMMUNITY PROP-
ERTY.***

- I. The Spanish Law.
- II. Whether the Title is Onerous or Lucrative.
 - a. Texas Rule.
 - b. California Rule.
- III. Test for Determining Its Character.
- IV. Effect of the Subsequent Death of the Wife.
- V. Where the Property is Possessed by One of the Spouses Before Marriage.
- VI. Effect of Payment Out of the Separate or Community Property.
- VII. Where Granted for Military Service.
- VIII. Rights of a Second Wife.
- IX. Rights of a Reputed, but not Legal, Wife.
- X. Various Public Grants.
 - a. Colonization Certificates—Homestead Laws.
 - b. Timber Lands.
 - c. Mining Lands.

I. The Spanish Law.

Where a sovereign power grants real property to one of the spouses alone, an interesting question arises as to whether it is separate or community in character. Lands granted by the king of Spain to a married man were considered as part of his separate estate: *De Lemos v. Garcia*, 1 Mart., N. S., 324; *Frique v. Hopkins*, 4 Mart., N. S., 212; *Rouquier v. Rouquier*, 5 Mart., N. S., 98, 16 Am. Dec. 186. An exception to this rule existed in Louisiana, which was that if the concession were made upon a consideration which was a burden on the community it became community property: *Wilkinson v. American etc. Co.*, 20 Mo. 122. This also applied to lands granted by the Mexican government under the colonization laws, and donations thereof were deemed the husband's separate property: *Scott v. Ward*, 13 Cal. 458; *Wilson v. Castro*, 31 Cal. 420; *Hood v. Hamilton*, 33 Cal. 698.

II. Whether the Title is Onerous or Lucrative.

a. **Texas Rule.**—A conflict has arisen between the Texas and California courts as to what are onerous conditions, for if the title be lucrative, the land is the husband's alone; if onerous, it is the community's. In *Yates v. Houston*, 3 Tex. 433, the court defines an onerous title as "that by which we acquire anything, paying its value in money, or in any other thing, or in services, or by means

*REFERENCE TO MONOGRAPHIC NOTE.

Lands given by a sovereign to either of the spouses: 16 Am. Dec. 186.

of certain charges and conditions to which we are subjected." It was accordingly held that the payment of fees prescribed by law and the performance of certain services to be rendered on the land in regard to its cultivation brought such a grant within that definition, thus making it community property: See, also, *Edwards v. James*, 7 Tex. 372.

b. California Rule.—The opposite view is maintained in *Noé v. Card*, 14 Cal. 576, and represents the California rule. Chief Justice Field, in the course of his opinion, said: "The grant in question was issued upon the petition of Noé, in which he requests the officer, in the exercise of the authority vested in him, to concede the property, stating that he (Noé) required the same in order to erect a house. And the officer, in consideration of the petition and by virtue of his authority, makes the concession. The request made in the petition is not to purchase the lot, but that it be conceded to the petitioner, and the officer grants the favor which was requested. Both parties appear to have treated the matter as a donation, sought on the one hand and accorded on the other, not as a contract of sale and purchase. To the grant certain conditions are attached, which are supposed to change the character of the transaction from that of donation into one of sale. The first condition provides that within one year from the date of the grant, the premises shall be fenced, and a house constructed thereon; the second, that the petitioner shall hold the premises subject to the existing municipal laws and regulations, and those which may be subsequently established; the third designates the penalty for nonfulfillment of the first condition, and the consequences of nonconformity with the second; the fourth requires the payment of the municipal fees established by law. . . .

"At the civil law, as at the common law, donations may be accompanied with conditions, the performance of which may be required for the possession or enjoyment of the property donated. . . . When the donation is so solicited for specific purposes, it may be accompanied with conditions limiting the property to such purposes without changing the character of the act, even when the conditions impose the discharge of expensive and burdensome duties. Thus, if one should solicit a gift of land in order that he might construct a church or college thereon, and the land should be granted on condition that such church or college be erected, the gift would be none the less a donation for the presence of the condition.

"The reason is obvious, and founded on the distinction existing between the inducement or motive for an act and the consideration or price for it. The erection of the church or college, in the case supposed, and the consequent benefit to the community generally, would constitute the inducement to the act, while a consideration in the nature of a price would be entirely wanting. In the present case, the donee solicited the premises for the purpose of erecting a house. . . . The premises were not, therefore, the less gratuitously

given or the less valuable to him, because granted subject to the condition of their appropriation to that end. The house and fence were to be built for the benefit of the donee, and not for the government. There was, therefore, no consideration in the performance of these acts, moving to the government, which can be regarded in the nature of a price, which is essential in all contracts of sale. The condition requiring the construction of a house within a year, was very generally annexed to grants made under the Mexican government in California, whether the grant embraced a city lot or leagues of land. The performance of the condition was exacted in furtherance of the general policy of the republic to induce settlements, and not as a price to the government upon any notions of a sale."

The court then makes mention of the case of *Yates v. Houston*, 3 Tex. 433, representing the Texas rule, and after stating what was there held, proceeded: "The error, as we conceive, of this decision consists in regarding the fees paid to the officers, and the services rendered in settling upon the land, as constituting a valuable consideration in the nature of a price to the government. The fees incurred in making the survey and in issuing the title papers were altogether incidental to the grant and formed no part of its consideration, and the services rendered in the settlement were directly for the benefit of the grantee, and only collaterally and remotely for the benefit of the government. Agricultural lands solicited under the colonization law were supposed to be for use and cultivation by the petitioner, and the grant to him was only subject to their appropriation to that end. Such limitation could not affect the character of the grant as a donation and convert it into a purchase. The government, in fact, said to the petitioner, if you want the lands for use and cultivation, you may have them for that purpose, in other words, we will give them to you if you will use them."

III. Test for Determining Its Character.

The true test for determining whether a grant of colonial land is separate or community property is stated to be as follows: "1. Did the surviving husband receive the grant by reason of such immigration, settlement, residence, etc., on his own part, as would, under the law, entitle him to it, independently of the right based upon his status as a married man at the date of the death of his wife? If so, it was his separate property. 2. Was the increased quantity over that to which a single man not the head of a family was entitled given to the surviving husband by reason of the fact that, at the date of the death of the wife, he was then a married man? If so, it was community property of the husband and the deceased wife, her half-interest in which, subject to the debts of the community, would descend to her children": *Hodge v. Donald*, 55 Tex. 344; *Garner v. Thompson*, 2 Posey U. C. (Tex.) 233. So where a man and wife immigrated and settled on certain land, and then the wife died, a certificate issuing to him as head of the family by

reason of that settlement, it is community property: *Rudd v. Johnson*, 60 Tex. 91.

IV. Effect of the Subsequent Death of the Wife.

The authorities generally hold that the subsequent death of the wife does not alter the nature of the property as community property; that the land having been regularly located and settled upon, she has an inchoate title therein, and this is not defeated though the certificate, grant, or patent does not issue till after her decease: *Brown v. Fry*, 52 La. Ann. 58, 26 South. 748; *Cannon v. Murphy*, 31 Tex. 405; *Carter v. Wise*, 39 Tex. 273; *Caruth v. Grigsby*, 57 Tex. 259; *Ahern v. Ahern* (the principal case), 31 Wash. 334, 71 Pac. 1023. In *Porter v. Chronister*, 58 Tex. 53, a man, with his wife and children, emigrated to a colony and settled upon a tract of land, four years after which the wife died. He then applied and secured a certificate for six hundred and forty acres, by reason of that emigration and settlement; subsequently a portion of that certificate was applied to the land, which was afterward patented to an assignee of the husband; and the court held it community property. Where the husband had not been in possession the time required by statute at the time of his death, but the widow thereafter completing the statutory period, she then obtaining the patent in her own name, it became her separate property: *Richard v. Moore* (La), 34 South. 593. That decision seems to announce a different doctrine from that set forth in the principal case, for it is there held that the title to the property is determined by its inception, which, arising during the existence of the community, stamped it as community property.

Where a statute authorized the granting of land to actual settlers, a wife who died before the passage of that law was held to have no interest therein: *Caudle v. Welden*, 32 Tex. 355. See, also, *Labish v. Hardy*, 77 Cal. 327, 19 Pac. 531, 23 Pac. 123.

In *Webb v. Webb*, 15 Tex. 274, a man and wife emigrated to Texas, the wife dying the next year, leaving two children. The following year the title was extended for a league of land as head of a family, which had been selected during the wife's life, but the empresario refused to assent to the extension. This the court held to be the separate property of the husband. In a subsequent decision, speaking of this case the court said: "Nothing had been done before the death of the wife, which would attach an equity, in favor of the heirs of the wife, upon the grant issued after her death to the husband. It was not shown that any legal step had been taken before her death to secure the land or a title": *Wilkinson v. Wilkinson*, 20 Tex. 237. On that ground the court there distinguished it from the case then before them, where a conditional certificate was issued and the land surveyed during the wife's life, she living three years after its issue, so that her husband became entitled to an absolute grant before her death, it being held com-

munity property. *Webb v. Webb*, 15 Tex. 274, has, however, been questioned in a subsequent case: *Manchaca v. Field*, 62 Tex. 135.

Where the land is entered in the wife's name during marriage, but a patent is issued after a dissolution of the community by a judgment, the land is presumed community property, title dating from the entry and not the patent: *Simien v. Perrodin*, 35 La. Ann. 931.

V. Where the Property is Possessed by One of the Spouses Before Marriage.

The general rule is that if either of the spouses has acquired an equitable right to property, which is perfected after marriage, it is considered separate: *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811, citing *Barbet v. Langlois*, 5 La. Ann. 212; *Succession of Morgan*, 12 La. Ann. 153. Commenting on similar decisions the court said: "In the case of *Morgan v. Lones*, 80 Cal. 317, 22 Pac. 253, it was determined that the occupant of lands for whose benefit the town-site acts were passed had an equitable interest in the lands, and, if such occupant is an unmarried woman and marries, such interest is her separate property; and this is so, although the patent from the government to the municipal authorities has not issued. The property does not become community property from the fact that the husband advanced the funds necessary to get a conveyance from the municipal authorities. In support of the same principle are found the cases of *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274, and *Labish v. Hardy*, 77 Cal. 327, 19 Pac. 531.

"In the case of *Gardner v. Burkhart*, 4 Tex. Civ. App. 590, 23 S. W. 709, *Gardner*, when unmarried, entered upon and improved one hundred and sixty acres of land and made application therefor under the homestead laws of Texas, which, in the principle requiring residence and improvement, followed those of the United States, and thereafter divided the tract with a brother, but continued to live thereon. He afterward married, and made application for fifty-five more acres adjoining the tract upon which he lived, and patent was issued to him therefor for the one hundred and thirty-five acres, which he continued to occupy as a home. Upon these facts, it was held that the original eighty acres located and improved by *Gardner* was his separate estate; and a similar conclusion was reached in *Lawson v. Ripley*, 17 La. 238."

Where a contract was entered into between a government and an individual, he agreeing to colonize the land, and a certain quantity of land was to be granted him in return, and he carried out his contract, but before the land was set apart he married, it was held his separate property, the title relating back to its origin, and its character being determined therefrom: *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281.

In *Lake v. Lake*, 52 Cal. 428, a man was in possession of a tract of land under grantees claiming under a grant from the Mexican

government; while in possession he married, and the grant was afterward rejected. Then Congress passed an act permitting persons in the possession of said land to buy it from the United States. He did so, and it was held his separate property.

VI. Effect of Payment Out of the Separate or Community Property.

Payments made by one of the spouses alone will not suffice to change the character of property which is in fact community. So where a man and wife settle upon public land, after the wife, before marriage, had paid the surveyor's fees, the land will still be community property. "The land was not acquired through this payment, but through the joint effort of her husband and herself in settling upon the land and improving it. These fees were not in contemplation of law due until after the settlement was made. They were mere advancement by the wife to pay a debt of the community, without the payment of which their title to the property could not be perfected. She thereby became a creditor of the community to the extent of the money advanced, and her claim a charge upon the property saved to the marital partnership": *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612.

In *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274, an unmarried woman acquired an initiatory right of pre-emption upon certain public lands. Thereafter she married, and then paid the government, receiving a patent for the land. It was held that the property was her separate estate, even though it should be shown that community money paid for it.

In *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 248, a husband, after marriage, entered into the possession of public land under deeds from former owners. Afterward the United States government issued a patent to the trustees of the town, in trust for the occupants, and the husband applied for a conveyance of the land to his wife, paying the fees. The court held that it was not the separate property of the wife; that it was acquired by purchase after marriage; and distinguished it from *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274, in the following words: "There the land was acquired by pre-emption. And, so far as this aspect of the case is concerned, the decision was founded upon an express provision of statute that it must be shown that the pre-emptor had not 'directly or indirectly made any agreement, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.' The husband had consented (either expressly or impliedly) to the use of the community funds; and the court said that in view of such consent, to give him a right because of the use of such funds would amount to an indirect agreement, which would be 'in violation of the spirit and letter of the pre-emption law.' There is no such provision in the townsite act under

consideration. And this is the distinction between the two cases in this regard."

VII. Where Granted for Military Service.

While, according to the Spanish law, land granted to a man became his absolutely, there was one exception to the rule, and that was where the land was given in remuneration of military services rendered by him to the king when he served without pay and was supported at the expense of the community: *Hughes v. Brown*, 4 La. Ann. 248.

Where land is granted a man by the government as a reward for military services, it is a gift, and not upon onerous title, and becomes his separate property: *Ames v. Hubby*, 49 Tex. 705; *Hatch v. Ferguson*, 68 Fed. 43, 15 C. C. A. 201, 29 U. S. App. 651; and it makes no difference that, the land having been granted before marriage, the certificate was not issued till after: *Parker v. Newberry*, 83 Tex. 428, 18 S. W. 815.

A distinction is made, however, between such cases and those where land was offered such men as would volunteer in defense of their country; and, under those circumstances, if the volunteer married, it was community property, as it was earned under a contract with the government and was thus acquired by onerous title: *Barrett v. Spence*, 28 Tex. Civ. App. 344, 67 S. W. 921; *Kircher v. Murray*, 54 Fed. 617, affirmed in 60 Fed. 48, 8 C. C. A. 448, citing *Nixon v. Cattle Co.*, 84 Tex. 408, 19 S. W. 560.

VIII. Rights of a Second Wife.

A second wife cannot claim that the land obtained for colonization is community property, where it was settled on by the husband and his first wife, as the certificate is issued by reason of his having settled in Texas with his family, the fact that he is a married man when the certificate is issued being of no importance: *Boone v. Hulse*, 71 Tex. 176, 9 S. W. 531. *Norton v. Cantagrel*, 60 Tex. 538, was a similar case, the court holding that a child of the second marriage inherited nothing from its mother, as it was the first, and not the second, marriage which fixed the community character of the property.

IX. Rights of a Reputed, but Not Legal, Wife.

The Texas courts hold that the woman posing as the immigrant's wife need not be so in reality, and land acquired by them as colonists is community property between them, although the man has a wife living elsewhere: *Babb v. Carroll*, 21 Tex. 765, the court saying: "There is no proposition more clear or indisputable than that grants of lands to heads of families were made on the supposition that the family was a Texas and not a foreign family, that the family was in fact in Texas, and as such was the meritorious consideration of the grant. . . . It has never been imagined that

where there was a family in Texas recognized and admitted as such, and being the very objects that were the consideration of the grant and for whose benefit it was intended, the courts had authority, years afterward, to look to foreign countries to ascertain whether the husband, etc., may not have left a family elsewhere. The family ought to have been here in fact, and in contemplation of law was here to authorize the grant, and if there were a family here at the accrual of the right to the grant, the members of that family, to the extent of the community right of the wife, or reputed wife, must take to the exclusion of claimants elsewhere, who in fact, formed no part of the family contemplated by the law as the proper recipients of the bounty of the government."

A somewhat similar case is *Yates v. Houston*, 3 Tex. 433, in which case a woman separated from her husband and disappeared before he came to Texas. It was held that she should be presumed to be dead; and that cohabitation with another woman, there being no impediment to the marriage, should be presumed lawful; and the property was held to be the community property of the man and woman who immigrated together and lived with him as his second wife.

Where a husband receives a deed to land, which is void, the wife dying thereafter, and a third person locates certificates thereon, on which patents were afterward issued, such person suing the husband and after marrying again, a compromise is effected in the suit, by which a portion of the land is given the husband, such land is community property of the second marriage, the fact that the title was acquired after the second marriage making a *prima facie* case of title in the original locator and his second wife; and it can be rebutted in a suit by a child of the former marriage only by showing that the consideration inducing the conveyance came either from the husband, his first wife, or from their community: *Duncan v. Bickford*, 83 Tex. 322, 18 S. W. 598.

In *Hatch v. Ferguson*, 68 Fed. 43, 15 C. C. A. 201, 29 U. S. App. 651, it was held that where a man and woman lived together, three years after which he received a land warrant, which was patented the next year, and he subsequently married her, the land was not community property under the Washington statute, providing that property owned by a spouse before marriage or subsequently acquired by gift, bequest, devise or descent should be separate property, and property otherwise acquired, community.

X. Various Public Grants.

a. **Colonization Certificates—Homestead Laws.**—There seems to be a difference in the character of the land granted under various laws. Colonization certificates, as before remarked, are regarded by the Texas courts as community property: *Simmons v. Blanchard*, 46 Tex. 266; as are also headright certificates issued under the constitution

of the republic of Texas to heads of families: *Parker v. Chance*, 11 Tex. 513, citing *Burris v. Wideman*, 6 Tex. 232.

Land acquired under the United States homestead laws are community property, when the title is obtained during marriage, as it is then taken by purchase, by reason of the settlement and improvement thereon, in which the wife participates as well as the husband: *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229. And see *Brazee v. Schofield*, 2 Wash. Ter. 209, 3 Pac. 265.

b. Timber Lands.—Land acquired under the act of Congress providing for the sale of timber lands is held to accrue to the sole benefit of the husband: *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402, the court basing their decision for so holding upon the fact that the applicant must make oath that it is for his own exclusive use and benefit; and that it is the practice of the government to allow the husband and wife each to make an entry of one hundred and sixty acres under the provisions of the act, which can be done only upon the ground that the land so acquired is the exclusive individual property of the person acquiring it.

c. Mining Lands.—There are conflicting decisions on the question whether mining property granted by the United States government after marriage is community property. *Jacobson v. Bunker Hill etc. Co.*, 3 Idaho, 126, 28 Pac. 396, holds that it is. *Phoenix Min. etc. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777, disapproves that case and holds that it is the separate property of the husband, citing *Black v. Mining Co.*, 163 U. S. 445, 16 Sup. Ct. Rep. 1101, decided since the Idaho case.

PAGE v. URICK.

[31 Wash. 601, 72 Pac. 454.]

FIXTURES.—A Dwelling-house Built by Consent of a city upon one of its streets resting upon wooden blocks laid on the ground and by mistake constructed so as to extend over the street line upon adjoining property, but erected upon condition, that it might be removed upon notice from the city, is personal property. (p. 925.)

FIXTURES—Conditional Sale—Replevin.—If a dwelling-house, which is personal property, is sold under a conditional contract of sale, the vendor may, upon a breach of the conditions of sale, recover the house in an action of replevin. (p. 926.)

G. W. Fogg and H. F. Norris, for the appellant.

601 FULLERTON, C. J. In the summer of 1900, the appellant, after obtaining leave to do so from the city authorities, built a dwelling-house on what he supposed to be one of the streets of the city of Tacoma, the permit being granted on con-

dition that he would remove the building at any time after receiving thirty days' notice to that effect from the city. By mistake, however, the house was built so as to extend over the line of the street some seven feet on an adjoining vacant lot. The house was built on wooden shoes, extending the entire width of the house, which rested on wooden blocks laid on the ground, so that the house could be removed at any time without disturbing the freehold. ⁶⁰² In fact, the purpose of the shoes was to facilitate removal, and enable the appellant to comply without trouble with his agreement with the city. On October 25, 1900, the appellant entered into a written agreement with the respondents, by the terms of which he agreed to sell them the house for a consideration of seven hundred dollars, three hundred dollars to be paid in cash, and the balance in four annual installments of one hundred dollars each, payable on the twenty-fifth day of October of the years 1901, 1902, 1903, and 1904, and a monthly payment of six dollars per month during the time any part of the purchase should remain unpaid in lieu of interest. It was expressly stipulated in the agreement that the title to the property should be and remain in the appellant until the entire purchase money should be fully paid; that upon the final payment of "said four hundred dollars, and the further and additional payment of said six dollars per month rent, that then, and in that case, said house shall become the property of said purchasers"; that time was the essence of the contract, and in case of failure to pay the purchase money, or any part thereof, when due, the appellant should have the right to take possession of the house, and the purchasers should vacate the same peaceably, and without legal process. The agreement was signed by both the vendor and vendee, and placed of record in the auditor's office of Pierce county. The respondents paid the three hundred dollars before taking possession of the property, and subsequently paid ten dollars additional as rent, but refused to pay anything further, or recognize that the appellant had any rights in the property. At the time of the commencement of this action there were eighty dollars due as rents or interest, together with the installment of 1901 of one hundred dollars. On the refusal of the respondents to make further payment on the purchase price, the appellant demanded possession of the house, and, on their refusal to deliver it up, ⁶⁰³ brought this action in replevin to recover it. In his complaint he set out substantially the foregoing facts. The answer was a general denial, and an affirmative plea of ownership on

the part of the respondents. On the trial the appellant introduced evidence tending to substantiate all of the allegations of his complaint, and rested, whereupon the respondents moved for a nonsuit, which the court granted. Judgment of nonsuit was thereupon entered, from which this appeal is prosecuted.

The respondents have not appeared in this court, and we are not, therefore, advised as to the reasons which are relied upon to sustain the judgment of the trial court, but, looking to those which obviously suggest themselves, we find none which seem to us conclusive. Under the facts stated, the dwelling-house was personal property: *Cobbey on Replevin*, 2d ed., sec. 373; *Jewett v. Patridge*, 12 Me. 243, 28 Am. Dec. 173; *Commissioners of Rush County v. Stubbs*, 25 Kan. 322. The contract was a conditional sale, in which title did not pass to the vendee, and the property was subject to recovery by the vendor on a breach of the conditions of sale: *Edison General Electric Co. v. Walter*, 10 Wash. 14, 38 Pac. 752; *Quinn v. Parke & Lacy Machinery Co.*, 5 Wash. 276, 31 Pac. 866; *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51. A dwelling-house, which is personal property, can be recovered by the owner from one wrongfully in possession by an action of replevin: *Commissioners of Rush County v. Stubbs*, 25 Kan. 322; *Michigan etc. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035; *Weathersby v. Sleeper*, 42 Miss. 732; *McDaniel v. Lipp*, 41 Neb. 713, 60 N. W. 81; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554. On the record, therefore, it would seem that the trial court erred in granting a nonsuit. The ⁶⁰⁴ appellant, by his evidence, showed ownership of the property, a right to its possession, a demand on the respondents for its surrender, their refusal to surrender it, and their consequent wrongful detention of the same. As the property was subject to replevin, these proofs made a *prima facie* case, easily sufficient to sustain a judgment, if the jury found them to be true. The rule is not changed because it appeared that the house was built in part on the land of another by mistake. The owner of that property cannot claim it until, at least, he has directed its removal and the appellant delayed doing so for an unreasonable time.

The judgment is reversed, and the cause remanded for a new trial.

Mount, Anders and Dunbar, JJ., concur.

Buildings not attached to the land may be regarded as personalty: *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, ante, p. 314, and cases cited in the cross-reference note thereto; and replevin will lie to recover them: See the monographic note to *Sinnott v. Feiock*, 80 Am. St. Rep. 758.

DE WALD v. INGLE.

[31 Wash. 616, 72 Pac. 469.]

EVIDENCE—*Opinion of Amount of Damages.*—Testimony of plaintiff as to the money value of his damages arising from a personal injury is inadmissible. (p. 933.)

TRIAL—*Objections and Exceptions to Evidence.*—If a proper objection to the admission of evidence is made and overruled and an exception taken, such objection and exception apply to subsequent errors of the same nature in the examination of the witness without a renewal thereof. (p. 934.)

Martin & Grant, for the appellant.

Merritt & Merritt, for the respondent.

⁶¹⁶ DUNBAR, J. This action was commenced by respondent for damages resulting from injuries received in a fight with appellant. On the fourth day of August, 1901, appellant, accompanied by a woman to whom he was engaged to be married, and whom he afterward did marry, and her little boy, was driving through the village of Lamona, in this state, along the road in front of a saloon, where several men were assembled. As they were driving ⁶¹⁷ peaceably by these men began to halloo at them, calling the appellant vile and vulgar names, and using language too indecent to be recorded, but which appears in the statement of facts. Appellant urged his team up, attempting to get out of hearing, but, as the obscene language increased, he was so outraged and irritated that he got out of his buggy and started back, when the man who had been black-guarding him ran into the saloon. On his way back he picked up two rocks. When he stepped into the saloon he asked who had insulted him and his intended wife, and the respondent answered him with an oath. Blows followed, and the appellant struck the respondent over his head with one of the rocks, which inflicted the injury complained of. This statement, it will be understood, is in accordance with the testimony of the appellant, the respondent testifying that he was not one of the crowd that hallooed to the appellant as he was passing by,

and that he did not answer him in the saloon in the manner asserted by the appellant. The trial resulted in a verdict and judgment for respondent in the sum of one thousand dollars. From such judgment this appeal is taken, and the assignments are: 1. That the court erred in overruling the motion for a new trial; 2. In permitting respondent to testify, over appellant's objection, as to the amount of his damages in money; 3. In permitting counsel for respondent to re-examine and cross-examine respondent as to the amount of his damages; 4. In admitting a rock in evidence, over appellant's objection for the reason that said rock had never been identified; and in giving the jury certain instructions.

The respondent moves to dismiss this appeal for the reason that no exceptions or objections were ever taken, as by law required, or at all, to any of the rulings and decisions ⁶¹⁸ of the trial court, and no exceptions or bill of exceptions was ever taken, filed, or presented in the trial court; that the statement of facts certified to this court should not be considered by this court, for the reason that no exceptions were taken to any of the rulings of the trial court. An examination of the record shows that this motion is entirely without merit, and it will therefore be denied.

The first error alleged is necessarily involved in the second, namely, that the court erred in permitting respondent to testify, over appellant's objection, as to the amount of his damages in money. After the statement by the plaintiff of his condition resulting from the blow which he received at the hands of the appellant, the witness was asked to state as near as he could the approximate damages he had sustained. The answer was: "Well, I would not have been hit for anything. Q. Can you state your damages in dollars and cents? A. Well, I would not have it there for one or two thousand dollars."

The attorney for the plaintiff, not being satisfied with the answer, proceeded: "Q. I will ask him this question: I will ask you if you can place a value upon the pain and suffering of that scar in your estimation. A. No, I cannot. Q. You don't understand me. Can you place a value upon the pain and suffering you sustained by reason of that blow? A. Just as I tell you. It keeps aching right along. Q. Can you fix the price of that pain and ache in dollars and cents? A. No, sir. Q. Has it been any damage to you in dollars and cents? A. Well, I think it has. Q. Tell us how much you have been damaged in dollars and cents. A. I guess about seven

dollars. Q. I am talking about the pain, you told the jury you are suffering, and that you have a scar there. Now, I am asking you to place a value upon that if you can in dollars and cents; what has it damaged you? You can certainly tell that. A. About two thousand dollars, anyway; that much damage."

619 Still not satisfied with this answer, the counsel for respondent pursued his questions as follows: "Q. Now, Mr. De Wald, you have stated that this has been aching and paining and hurting you ever since you were struck, and still continues that way, and there is a scar there of considerable length. Do you understand that I am asking you how much that pain and scar and suffering has damaged you? A. It has damaged me four or five hundred dollars anyway. Q. You would be perfectly willing to have it there for four or five hundred dollars? A. Yes."

There is no gainsaying the general rule that it is not within the province of a witness to testify as to the value of damages sustained, but that he should testify only to the facts, from which the jury will determine the amount of the damages. The rule is thus stated by 3 Sedgwick on Damages, eighth edition, section 1290: "Another general rule, which pervades all our law, is that the witness is to testify only to facts. He is to speak as to the facts which he has heard or seen. His opinion is not to be given; for it is the opinion of the jury on the testimony which forms the verdict and decides the case."

There are, however, some exceptions to this general rule, notably the testimony of experts on questions of science and skill, where the jury are not capable of determining the logical results or effects of a given statement of facts. In such cases it becomes necessary for some one, who is able to properly and intelligently interpret facts, to state to the jury the result of a fact or combination of facts. This testimony is admitted, in spite of the general rule, from the necessities of the case. In such case it is left to a cross-examination to elicit the qualifications of the witness to testify in such cases. But in the case at bar a cross-examination would be futile, for it could elicit nothing but a reiteration of the conclusion announced by the **620** witness that he was damaged in a certain amount. This must necessarily be so, for if there were any facts which he could state to elucidate his condition to the jury, by means of which they could determine the amount of damage, those facts, instead of the opinion of the witness, should have been submitted to the jury, and would have avoided the necessity of the

expression of opinion. The testimony in this case illustrates forcibly the fallacy of permitting the opinion of the witness as to the amount of his damage to go to the jury. It was held in *Anderson v. Ogden Union Ry. etc. Co.*, 8 Utah, 128, 30 Pac. 305, that the amount of damages recoverable for personal injuries in any case is not to be determined by the opinions of witnesses, but is for the jury under all the circumstances of the case. In *Ohio etc. Ry. Co. v. Nickless*, 71 Ind. 271, as in the case at bar, where the plaintiff testified for himself as a witness, after testifying to his injuries, the following occurred: "The plaintiff was here asked to state the amount of damages he had sustained by the injuries he had described, to which question the defendant objected, for the reason that it was simply asking for the opinion of the witness; whereupon the court ruled that the witness might state the facts showing the extent of his damages, and calculated to measure the amount of his damages; that he had already spoken about loss of time and medical attention; that he might state any other pertinent matters, but that his mere opinion was not worth anything; that the jury founded their verdict on facts, and not opinion, but that, where an amount constituted a fact, it might be given. . . . The witness then stated that he had sustained damages to the amount of at least five thousand dollars."

In passing upon the question of the legality of this testimony, the supreme court of Indiana said: ⁶²¹ "The evidence of the plaintiff as to the amount of damages sustained by him was clearly incompetent; and the ruling of the court, that, where the amount of damages constituted a fact, the statement of the witness as to the amount might be given, was erroneous. The witness might very properly describe his injuries, but it was not competent for him to estimate the amount of damages which he had sustained. That was for the jury to determine. Nor can we say that the testimony was harmless, because the jury returned two thousand dollars as the damages, instead of five thousand dollars, the amount estimated by the plaintiff. We cannot say that the amount found was not in some degree influenced by the estimate which the plaintiff put upon his damages."

So, in the case at bar, it would be difficult to understand the verdict of the jury on any other theory than that they compromised the statements made by the respondent himself as to the amount of his damages, for he stated at one time that he was damaged at least two thousand dollars, and at another that he

was damaged from four to five hundred dollars, and that he would be perfectly willing to have the pain and scar there for four or five hundred dollars. In *Atchison etc. R. R. Co. v. Snedeger*, 5 Kan. App. 700, 49 Pac. 103, it was held that in an action for the recovery of damages on account of personal injuries, it was error to admit a witness, over objection, to give his opinion as to the amount of damages suffered by plaintiff.

The above cases are all cases involving claims for damages for personal injuries. But other courts have laid down the same rule in other damage cases, and where the same principle is involved. In *Chicago etc. R. R. Co. v. Springfield etc. R. R. Co.*, 67 Ill. 142, where a witness was asked the direct question of what the damages would be under a given state of facts, and his answer was that there would be no damage, the supreme court said: ⁶²² "This evidence was improper, not only upon the ground that the question called for the mere opinion of the witness, upon the assumption that appellee would put in the work when in nowise obligated to do so, but upon the further ground that it was an opinion covering the very question which was to be settled by the jury, and so conclusive of it as to leave to the jury no other duty but that of recording the finding of appellant's witnesses. It amounts to nothing more nor less than permitting the witnesses to usurp the province of the jury."

In *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120, it was said: "But the opinions of witnesses, as to the amount of damage done by the construction or operation of the road, are not competent evidence. They may state the particular injuries, and the jury are to form their own conclusion of the amount, from the facts proved. . . . In the case at bar, the interrogatories, in effect, call upon the witness to estimate the damages, and the answers plainly show a mere opinion as to the amount. Plaintiffs' objections were well taken, and should have been sustained."

In *Wichita etc. R. R. Co. v. Kuhn*, 38 Kan. 675, 17 Pac. 322, the following question was asked: "How much less, in your opinion, is this farm worth after the railroad company had established their track through it, irrespective of any benefits from any improvements proposed by the railroad company to be derived from said track, taking into consideration all incidental loss, inconveniences, and damage, present and prospective, which may be reasonably expected or shown to exist from the maintaining of said railroad track, to be continued permanently. Answer. About two thousand one hundred dollars."

The supreme court, in commenting upon this testimony, said: "The court below certainly should not have permitted this evidence to be introduced. It involved substantially everything that the jury were called upon to determine; ⁶²³ and left nothing for the jury to decide. It invaded the province of the jury. It really amounted to letting the witness himself determine by his own opinion what the damages were, and the amount which the plaintiff should recover in the action."

"The opinions of witnesses, as to damage or loss, are not competent evidence, even in cases where the damages claimed are a proper subject of recovery. The facts, and all the facts going to show what the damages would be, should be given in evidence; and the jury must then draw their conclusion from the testimony of the witnesses as to the amount of the damage": *Giles v. O'Toole*, 4 Barb. 261.

In *Norman v. Wells*, 17 Wend. 136, the court, in speaking on this proposition, says: "The single opinion of no man can be followed. The best would be utterly delusive. Even where a witness is able to speak to all the facts of the particular case, his opinions are not to be received. I know that in questions of insanity, some courts allow witnesses to throw in their opinions from what they have seen and heard. But I always found that such cases were much better tried, where opinions were kept entirely out of view; and I have generally excluded them, except where they came from professional men. . . . The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury. If there be any rule without exception, it is this; and I have been unable to find any instance where the opinion of witnesses has been received. Bacon and Symonds, who were sworn in this case, might have possessed some knowledge in respect to the case peculiar to themselves. Every witness is supposed to have such knowledge; but he does not therefore become an expert, and entitled to speak on the general point of damages. If one may speak, another may. It is no reason for receiving such evidence that the defendant may cross-examine. That he might do of course; and the trial might thus be ⁶²⁴ protracted to an amazing length in taking opinions from the neighborhood."

In *Cook v. Brockway*, 21 Barb. 331, in the discussion of this proposition, it was said: "The witnesses should have stated the facts, and the jury should have exercised their judgment, and pronounced the damages. . . . The principle that witnesses shall not invade the province of the jury is an important one,

and there is great danger in departing from it. If the opinions of witnesses are to be substituted for the judgment of the jury, upon the evidence, parties will be able, by selecting their witnesses, and by talking and reasoning with them, etc., to control the amount of the verdict. Matters of opinion upon questions of damages are very uncertain; and whether the witness is honest in the opinion he gives is a matter that can rarely be decided. He may be corrupt and yet beyond the reach of punishment. If he swears to facts corruptly he may be punished; and generally the party against whom he testifies will have it in his power to give evidence upon the question, and protect himself upon the trial. But without pursuing the subject, the rule is well settled, and it should be adhered to in its true spirit."

To the same effect are: *Harger v. Edmonds*, 4 Barb. 256; *Wilcox v. Leake*, 11 La. Ann. 178; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Atlantic etc. R. R. Co. v. Campbell*, 4 Ohio St. 583, 64 Am. Dec. 607; *Shepherd v. Willis*, 19 Ohio, 142; *Morehouse v. Mathews*, 2 N. Y. 514; *Elwood Planing Mill Co. v. Harting*, 21 Ind. App. 408, 52 N. E. 621; *Bonner v. Copley*, 15 La. Ann. 504; *Bissell v. Wert*, 35 Ind. 54; *Cleveland etc. R. R. Co. v. Ball*, 5 Ohio St. 568; *Abbott on Trial Evidence*, p. 349, sec. 85; *Dalzell v. Davenport*, 12 Iowa, 437; *Tingley Bros. v. Providence*, 8 R. I. 493; and many other cases, too numerous to mention, some of which are cited in the appellant's brief. In fact, the uniform authority is to the effect that such testimony is inadmissible.

625 Respondent in defense of the admission of this testimony, cites but few cases, two of which are from this court. In *Sears v. Seattle Consolidated St. Ry. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, where the question asked the witness was, "What was there, if anything, to prevent him [the motorman] stopping the cars and applying the brakes a long time before he did?" the answer was, "He was running at too high speed to stop it at that distance." This testimony simply went to the cause of the injury, and not in any way to the value of the resulting damages. In *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273, the witness gave his opinion as to whether the respondent was badly hurt by the fall, and his testimony was sustained by this court. It is true this was an expression of opinion as to the character or degree of the injury, just as was the testimony of the respondent in the case at bar that the injury inflicted gave him great pain. But in the case

at bar, in addition to the statement of the injury respondent is permitted to measure the damages resulting from the injury—the very question at issue in the case and which was not involved in the case of *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273. We have examined the other cases cited by the respondent, but none of them sustain the testimony introduced in this case to which objection is made.

This recalls the contention of the respondent that the question of the admissibility of this testimony is not properly raised by the appellant, for the reason that the question first asked the witness in regard to the amount of damages which he had sustained was not intelligently answered, and that subsequent questions of the same kind were not objected to. An examination of the record shows that when the witness was asked to state his opinion in regard to the value of his damages, the objection was as follows: ⁶²⁶ “We object to the question for the reason that it is incompetent, irrelevant and immaterial, and is not the proper manner to prove damages for the reason that it invades the province of the jury, and it is not proper testimony as the witness should only be permitted to testify to facts from which the jury are to determine the damages.”

The court overruled the objection, and an exception was taken. The answer was: “Well, I would not have been hit for anything.” It is true that, to the subsequent questions in relation to the damage of the plaintiff in dollars and cents, no objection was made by the defendant, but he had already stated his objections, those objections had been overruled and an exception taken; and no good purpose would have been subserved in retarding the progress of the suit by constantly objecting and preserving exceptions to the identical character of questions that had already been admitted by the court over his objections. The objection to this character of testimony was made, exception was taken to its admission over the objection, and a motion for a new trial was made upon the ground of errors of law occurring at the trial, to which exceptions were taken. We think that the error is properly presented to this court.

This view of the question of the inadmissibility of this testimony renders unnecessary the discussion of the other errors assigned. The judgment will be reversed, and a new trial granted.

Fullerton, C. J., and Mount and Anders, JJ., concur.

In an Action for Personal Injuries, the opinion of the plaintiff as to the damages he has suffered is not, as a rule, admissible in evidence: Little Rock etc. Ry. Co. v. Haynes, 47 Ark. 497, 1 S. W. 774; Central R. R. etc. Co. v. Kelly, 58 Ga. 107; Ohio etc. Ry. Co. v. Nickless, 71 Ind. 271; Tefft v. Wilcox, 6 Kan. 46; Landrum v. Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001. See, also, Hurt v. St. Louis etc. Ry. Co., 94 Mo. 255, 4 Am. St. Rep. 374, 7 S. W. 1. However, one who was injured nearly two years before the trial, and whose injuries are of such a character as to be known to him, though he is not an expert, is competent to testify as to whether he is permanently injured: Alabama etc. R. R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28, 9 South. 303. And the opinion of a witness as to whether a party was badly injured by a fall is admissible: Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

EUTING v. CHICAGO AND NORTHWESTERN RY. CO.

[116 Wis. 13, 92 N. W. 358.]

EVIDENCE—Judicial Notice.—A Railroad Torpedo Should be Considered a dangerous agency as a matter of law. (p. 938.)

RAILWAYS—Liability of for Acts of Employés.—A railway corporation which places torpedoes in the hands of its engineer, to be placed on the track in certain contingencies as warnings to approaching trains, is answerable for his placing one on the track for his own amusement, though this is an act not contemplated by his employer. (p. 938.)

MASTER AND SERVANT—Tests of Liability.—If a servant departs from his employment, his master is not answerable. The rule is otherwise when he departs from, or neglects, a duty in the line of his employment. (p. 938.)

RAILWAYS—Liability of for Act of Engineer.—If an engineer places a torpedo on the track, and, knowing that it is still there and that third persons are close by, moves his engine so that the wheel passes over and explodes the torpedo, his employer is answerable to a third person thereby injured. (p. 939.)

Action to recover for personal injuries received by the explosion of a torpedo on the track of the defendant railway corporation. It had constructed a temporary spur track along a public street, and its engineer was engaged with his engine in attempting to pull upon the track a freight-car which had run off. The plaintiff and other boys were watching, when one of the defendant's employés placed the torpedo on the track about a foot from the driving wheel of the locomotive, which was soon afterward moved over the torpedo. It exploded, inflicting the injuries upon the plaintiff for which he sought to recover. The trial court directed a verdict for the defendant, and the plaintiff appealed.

Baker & Baker, for the appellant.

Edward M. Hyzer, for the respondent.

15 WINSLOW, J. The respondent's contention (which seems to have been adopted by the trial court) is, in brief, that the uncontradicted evidence shows that there was no occasion for the use of the torpedo in the transaction of the defendant's business; that it was placed in the care of the engineer, and the fireman had no authority to take it; that the fireman took it without the knowledge of the engineer, and placed it upon the track for his own amusement; **16** that in so doing he was entirely outside the scope of his employment, and hence that his principal is not responsible for the results of his act. If this contention were fully justified by the facts it is difficult to see how the conclusion could be avoided. We agree with counsel that the evidence shows that there was no occasion for the use of the torpedo at this time in the transaction of the defendant's business. It is clear that under the rules of the company it was only to be used as a signal to be put on the track when it was desired to stop an approaching train. We also agree that the evidence shows that it was placed in the care of the engineer, and that the fireman had no right to use it, or authority to take it from the engine, save as directed by the engineer. We cannot, however, admit that the uncontradicted evidence proves that the fireman placed the torpedo on the track without the authority or knowledge of the engineer. It is true that the fireman testifies to this effect, and that the engineer denies that he put the torpedo on the track, or knew of its being placed there, but there is evidence on the part of the plaintiff tending directly to show that the engineer himself placed the torpedo on the track. The nature of the evidence was as follows: The plaintiff and his two companions testified that a man jumped from the cab, placed something on the track, the character of which they did not know, and climbed back into the cab, pulled the lever, and started the engine, when the explosion took place. The engineer testified that the fireman did nothing about the operation of the engine, but that he himself pulled the throttle, and started it. Again, the plaintiff at the trial identified the engineer (both fireman and engineer standing before him) as the man who put the torpedo on the track. We regard this evidence as amply sufficient to carry the question to the jury.

So, in considering the motion to direct a verdict, it must be taken as though it were proven that the engineer placed the tor-

pedo on the rail, and moved the engine over it, causing ¹⁷ the explosion; and the question is whether a verdict against the defendant could be sustained upon this state of facts. That railroad torpedoes are, in their nature, dangerous agencies, cannot be doubted. It is common knowledge that they are loaded with some high explosive, and with a sufficient amount thereof to cause a loud explosion; and the danger which exists, even in the explosion of toy torpedoes, is too well understood to admit of doubt that railroad torpedoes should be considered as dangerous agencies as matter of law.

So the situation to be considered upon the motion is this: The defendant placed these dangerous explosives in the custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode, and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has departed from his employment is well understood. If this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult. The question, generally, is whether the servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems quite plain that a verdict for the plaintiff might be sustained. ¹⁸ The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was willfully or wantonly violating a duty

resulting from his employment, namely, his duty to safely keep and properly use the torpedoes. There have been many cases involving the application of this principle, and they cannot be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority. The doctrine is quite well stated in *Pittsburgh etc. Ry. Co. v. Shields*, 47 Ohio St. 387, 21 Am. St. Rep. 840, 24 N. E. 658, as follows: "A servant may depart from his employment without making his master liable for his negligence when outside of the employment of his master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own, but he cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes the negligence of the master."

The cases upon this subject will be found quite fully cited in the case of *Alsever v. Minneapolis etc. Ry. Co.*, 115 Iowa, 338, 88 N. W. 841. This was a case where an engineer blew off steam from a blow-off cock solely for the purpose of frightening some children, and one of the children, by reason of her fright, fell, and broke her leg, and it was held that a verdict for the plaintiff could be sustained under the principles therein stated.

19 There is, however, another view which may be taken of the case as made by the plaintiff's evidence, which also leads to the conclusion that it was a proper case for the jury to pass upon. If it be true as the evidence tends to show that the engineer placed the torpedo on the track, then he knew that a dangerous explosive was on the track immediately in front of the driving wheel at the moment he moved the engine, and that third persons were in close proximity. If, under such circumstances and with that knowledge, he moved his engine in the attempt to pull the car upon the track, the master would unquestionably be liable for injuries to such third persons which were proximately caused by the engineer's negligent act. Upon the plainest principles, the engineer could not, in prosecuting his master's business, move his engine over an obstacle or dangerous place upon the track which was known to him, when such movement was plainly imminently dangerous to third

persons, without rendering his master liable for the proximate result of his negligent act. These views necessitate reversal of the judgment.

By the Court. Judgment reversed, and action remanded for a new trial.

The Liability of a Master for the acts of his servant is discussed in the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93. The general rule as to the extent of the liability of a master for the acts of his servant is, that if the act is done without the authority of the master, and not for the purpose of executing his orders or doing his work, then he is not responsible; but if it is done in the execution of the authority given by the master, and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful: *McCarthy v. Timmons*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Guille v. Campbell*, 200 Pa. St. 119, 49 Atl. 938, 86 Am. St. Rep. 705, and cases cited in the cross-reference note thereto; *Lipscomb v. Houston etc. Ry. Co.*, 95 Tex. 5, 93 Am. St. Rep. 804, 64 S. W. 923; *Holler v. Ross*, 68 N. J. L. 324, ante, p. 546, 53 Atl. 472. As to the liability of a railroad company for injuries resulting from a torpedo negligently placed upon its track by an employé, see *Harri-man v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Hughes v. Boston etc. R. R.*, 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070.

WUERFLER v. TRUSTEES OF GRAND GROVE OF WISCONSIN OF THE ORDER OF DRUIDS.

[116 Wis. 19, 92 N. W. 433.]

CORPORATION—Ultra Vires, Estoppel to Urge.—When a contract made by a corporation has been so executed that, to allow the corporation to repudiate it would work injustice to the other party thereto, who has in good faith relied thereon, the doctrine of estoppel applies and prevents such repudiation, regardless of whether the corporation had the right to make the contract or not, unless its act in that regard was in violation of some written law of the state, or sound public policy. (p. 943.)

MUTUAL BENEFIT ASSOCIATIONS—Estoppel Against.—The doctrine of estoppel applies to mutual benefit associations in regard to their insurance contracts substantially the same as against ordinary insurance companies and other corporations. (p. 943.)

MUTUAL BENEFIT ASSOCIATIONS—Power of to Amend By-laws as Against Pre-existing Contracts.—The power reserved by a mutual benefit association to make changes in the rules, by-laws, and regulations of the order warrants only reasonable variances in insurance contracts. Hence, if a member has paid assessments for a long time, contributed to meet matured obligations of a specified sum for each member, no subsequent amendment of the constitution or by-laws can change such sum to an indefinite amount, probably much less than that sum. (p. 944.)

MUTUAL BENEFIT ASSOCIATIONS—By-laws.—The right of a benefit society is no broader than that possessed by any other corporation as to making or amending by-laws. (p. 944.)

CORPORATIONS—By-laws, Power of to Change.—The power of a corporation to make by-laws is limited to what is reasonable under the circumstances of each case. If, resolving fair doubts in favor of its action, the boundaries of reason have been exceeded, to that extent is the action of the corporation *ultra vires*. (p. 944.)

MUTUAL BENEFIT ASSOCIATIONS—By-laws.—Attempted Changes in Insurance Contracts between benefit societies and their members under the reserved power to amend by-laws, rules, and regulations, which are manifestly unfair, are void. (p. 945.)

MUTUAL BENEFIT ASSOCIATIONS—Power of the Courts Over.—Though, to a large extent, voluntary associations are independent of judicial control, when they proceed so arbitrarily as to manifestly violate the private rights of their members, they are amenable to the law the same as any other person, natural or artificial, as where they attempt to nullify their contracts of insurance and to substitute others therefor of an entirely different plan under the guise of changing the by-laws, rules, and regulations for the efficient administration of the plan. (p. 945.)

MUTUAL BENEFIT ASSOCIATIONS—Dues, Nonpayment of, When does not Forfeit Rights.—If a mutual benefit association notifies one of its members that his certificate will not be recognized as in force, it waives further payments thereon so long as its attitude in that regard continues. (p. 946.)

MUTUAL BENEFIT ASSOCIATIONS—By-Laws Requiring Application to the Grand Lodge to Settle Differences.—By-laws forming part of a contract of insurance providing that in case any difference arises between any member and his lodge concerning benefits coming to him or his heirs, he and they have the right and duty to apply to the grand lodge before commencing suit in any court, do not cover controversies respecting whether one is or is not a member of the order. (p. 946.)

MUTUAL BENEFIT ASSOCIATIONS—By-laws, Waiver of by Failure to Plead.—If a by-law of a mutual benefit association requires a member to apply to the grand lodge before bringing suit, the failure to urge in the answer noncompliance with such by-law waives it. (p. 946.)

MUTUAL BENEFIT ASSOCIATIONS—Waiver of the Submission of Claim to the Grand Lodge.—If the by-laws of an association provide that differences concerning benefits coming to the member or his heirs shall not be subject to a suit at law until after application to the grand lodge for redress, this is equivalent to an agreement to submit to arbitration, and is waived by the denial by the association of all liability against it under its certificate. (pp. 946, 947.)

Action to recover on a benefit certificate issued by the defendant to the order of Frederick Wuerfler, who died in 1897, having been a member of the defendant for more than twenty years prior to that date. Before 1895 certificates of membership were not issued, but at that time the custom of issuing certificates commenced, and one was issued to the deceased

providing for the payment on his death, in good standing, of one thousand dollars to his widow.

The defendant sought to prove that Wuerfler was not a member in good standing at the time of his death. It claimed that, by its constitution adopted in 1870, it had not power to insure members except for five hundred dollars each; that, though it had power to amend its constitution, such power was not exercised until 1896, and the change did not take effect until 1897; that by such amendment, the benefits were limited to the amount actually paid into the fund, and that the deceased failed to pay three assessments in February, 1897, by reason of which failure his membership ceased.

It was proved at the trial that there was an attempted amendment to the by-laws in 1894, increasing the limits of insurance to one thousand dollars, under which the certificate sued upon issued; that in February, 1897, all outstanding certificates were declared by defendant to be at an end, but the decedent refused to surrender his certificate when called upon to do so, and insisted upon his rights thereunder, and that his name was stricken from the rolls of the order for nonpayment of dues; that the method provided for the amendment of the constitution was not complied with in the change attempted to be made in 1894.

The plaintiff moved the court to direct the jury to return a verdict in her favor, but the motion was denied, and the jury having found that the decedent had not directed the treasurer of defendant to retain moneys out of his sick benefits to pay his assessments and lodge dues, the court directed a verdict for the defendant, and the plaintiff appealed.

Sylvester, Scheiber & Orth, for the appellant.

Julius E. Roehr and L. A. Brunckhorst, for the respondent.

24 MARSHALL, J. Did the court err in refusing to direct a verdict for plaintiff, upon the undisputed facts of the case?
25 That proposition raises the only question that need be discussed on this appeal. It involves, though, three minor propositions, which are as follows: 1. Was the certificate or policy of insurance, issued to Wuerfler pursuant to the constitution of the order as it stood after the attempted change in 1894, binding upon the parties at the time of the amendment of 1896? 2. Was the change in 1896, pursuant to which the attempt was made to call in all then outstanding certificates, an amend-

ment of the rules and regulations of the order within the meaning of the certificate in question? 3. Did the failure of Wuerfler to pay the assessments upon his membership and lodge dues, not payable absolutely until the end of February, 1897, affect the validity of his certificate, since before that time such certificate was declared void by the order, and its attitude in that regard continued till such time of payment expired?

1. The first question must be answered in appellant's favor. It is so ruled by the familiar doctrine that when a contract made by a corporation has been so far executed that to allow the corporation to repudiate it would work injustice to the other party thereto, who has in good faith relied thereon, the doctrine of estoppel applies and prevents such repudiation regardless of whether the corporation had a right to make it or not, unless its act in that regard was in violation of some written law of the state or sound public policy; that in such circumstances, if the corporation exceeds its power, it commits a punishable offense against the sovereignty of the people, but cannot itself invoke the doctrine of *ultra vires* to avoid its act, at the same time inflicting a grievous wrong upon the one who has in good faith relied upon the assumption that it possessed in fact the power which it pretended to have authority to exercise. Whether that doctrine should be applied to transactions between benefit societies and their members has been a subject for consideration in many courts, and the decisions in respect thereto are by no ²⁶ means harmonious. But the weight of authority is clearly in favor of treating such societies substantially the same as ordinary insurance companies and other corporations, as regards their insurance contracts. The subject was fully discussed here in a very recent case: *Ledebuhr v. Wisconsin Trust Co.*, 112 Wis. 657, 88 N. W. 607, where the authorities are collated to considerable extent. We will refer to that case instead of going so soon over the subject again.

2. Respondent did not possess unlimited authority to change its plan of insurance, giving the change retroactive effect, under the reserve power, made a part of the insurance contract, to make changes in the rules, by-laws, and regulations of the order. Such a reserve power is held to warrant only reasonable variances of insurance contracts—variances required, in the judgment of the order, in those matters of detail necessary or advisable in carrying out efficiently the fundamental principle or scheme of insurance, not changes destroying it. Obviously, changes in the by-laws, rules, and regulations regarding the

execution of a plan of insurance are quite different from changing the plan itself and nullifying all contracts entered into under it, as was done in this case. The essential features of the plan of insurance here were that each certificate holder's beneficiary should receive one thousand dollars upon and at the maturity of his contract, and that a fund should be accumulated by assessments upon the memberships in the order sufficient for that purpose. The way was undoubtedly open for the order to make reasonable changes respecting the hazards members might subject themselves to, and in regard to the number and amount of the assessments, the time of payment thereof, the effect of default in such payment, the notice required of assessments to put members in default, and many other matters of detail that might be mentioned. But after a member had paid assessments for a long period of time, contributing to accumulate money to meet the matured obligations of one thousand dollars each ²⁷ to beneficiaries, a change in the constitution of the order (the word "constitution" is here used as synonymous with "by-laws") rendering the certificate at maturity, instead of worth one thousand dollars, worth an indefinite amount and probably not half that sum, cannot seriously be considered a reasonable change in rules, regulations and by-laws as regards existing contracts. Such a change is a complete abrogation of the contract. It was so regarded in this case, as is evidenced by the action of the order formally nullifying all outstanding certificates and calling them in. It was supposed that the order possessed power, without consent of the certificate holders, to declare void the whole plan of insurance, under which it had operated for some two years, during which time many thousands of dollars had been paid into the death fund by members in the expectation that their beneficiaries would ultimately receive each one thousand dollars; and that it possessed such authority either upon the theory that the existing plan was not legally adopted by the order in 1894, or under the reserve power to make retroactive changes in by-laws, rules and regulations. The right of a benefit society is no broader than that possessed by any other corporation as to making by-laws. The power of every corporation in that regard has its limits, which are at the boundaries of what is reasonable under the circumstances of each case. Though that is determinable, primarily, by the corporation, there is this legal check upon it: If, resolving all fair doubts in favor of its action, the boundaries of reason have been exceeded, to that

extent such action is ultra vires: *Stafford v. Chippewa Valley R. R. Co.*, 110 Wis. 331, 351, 85 N. W. 1036. It is laid down as elementary that attempted changes in insurance contracts between benefit societies and their members, under the reserve power to amend by-laws, rules, and regulations, which are manifestly unfair, are void, it being presumed that in making such reservation both parties contemplated only reasonable variances: Niblack on Benefit Societies, sec. 25; 1 ²⁸ Bacon on Benefit Societies, sec. 91a. The idea is that the doctrine that vested rights cannot be disturbed by retroactive laws applies to by-laws changing insurance contracts containing the reservation that they shall be subject to future changes in the by-laws, rules, and regulations of the order, society or company, obligated under the contract, to this extent: While, since the contract contains such stipulation, no vested right can grow up under it to be free from such changes, such a right is embodied in the contract as regards unfair variances thereof—those essentially changing the plan of insurance instead of merely changing matters of detail in working out such plan.

Though to a large extent voluntary associations are independent of judicial control, when they proceed so arbitrarily as to manifestly violate the private rights of their members they are amenable to the law the same as any other person, natural or artificial. In matters of discipline and policy not manifestly violating private rights they are as supreme within their own field as a religious society. But when they go beyond that, attempting to nullify their contracts of insurance and to substitute others therefor on an entirely different plan under the guise of changing by-laws, rules, and regulations for the efficient administration of a plan, they cross the line and enter upon a field where the right to proceed may be successfully challenged before judicial tribunals: *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 20 N. E. 479.

We apprehend that the action of respondent would not have been taken except upon the theory that all outstanding certificates of insurance issued under the attempted amendment of the constitution of the order in 1894 were void. It was probably supposed, looking to the situation prior to such attempted amendment under which beneficiaries were entitled to only five hundred dollars, that the amendment of 1896 would not result in yielding materially less than such sum, and so would not exceed the reserved power. Had the outstanding ²⁹ certificates been considered valid, we apprehend no attempt would

have been made to make such a radical change as to declare them void without consent of the holders, and to substitute contracts of an entirely different character in their places. Our conclusion is that the action of the order, under the circumstances, was manifestly arbitrary and unfair—one clearly not within the contemplation of the parties to the certificate in question, and an invasion of the vested rights therein.

3. The last proposition is ruled in plaintiff's favor by *Guetzkow v. Michigan Mut. L. Ins. Co.*, 105 Wis. 448, 81 N. W. 652. It was there held upon principle and authority that an insurance company cannot be sustained in taking a stand as regards one of its policies which, if maintained, would render a tender of payment thereon by the policy holder useless, because the money would not be accepted as a compliance with the insurance contract, and then successfully plead failure to make such payment as a defense to the policy. The action of respondent in notifying Wuerfler, while he yet had ample time to pay his dues to the order, that his certificate would not be recognized as in force, effectually waived further payments thereon so long as its attitude in that regard continued.

A point is made that the judgment is right irrespective of whether the assignments of error are well taken, because of a by-law of the order which formed a part of the insurance contract, providing: "In case any differences of opinion arise between any member and his lodge, or between the heirs of member and his lodge, concerning benefits coming to such member or his heirs, such brother and his heirs shall have the right and the duty to apply to the grand lodge of the state of Wisconsin before he or they commence any action in any court of law."

There are several reasons why that does not affect appellant's right: 1. On its face it does not appear to cover controversies respecting whether a person is or is not a member ³⁰ of the order. It is confined to controversies within the order as between it and acknowledged members thereof or the heirs of such members. 2. Compliance with it is plainly not made a condition of a right but a condition of invoking judicial remedies to enforce a right; hence such compliance was waived by not complaining of noncompliance by answer, since there was no opportunity, by reason of the way the complaint was framed, to do so by demurrer: *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 1, 81 N. W. 1003. 3. The by-law, in effect, bound the beneficiary, if at all, to submit the controversy as to what

her rights were to arbitration, and was waived by the unqualified denial by respondent of all liability under the certificate: 2 May on Insurance, 495; Joyce on Insurance, sec. 3257.

The result is that at the close of the testimony appellant was clearly entitled to the direction of a verdict for the amount claimed, less the unpaid assessments, aggregating two dollars and forty cents, with interest from the maturity of the claim, August 26, 1897, and to judgment accordingly.

By the Court. The judgment is reversed and the cause remanded for a new trial.

A Mutual Benefit Association cannot enter into a contract with one of its members, and, after receiving large sums of money thereon, so alter its essential terms without his consent as practically to destroy its value: *Strauss v. Mutual Reserve etc. Assn.*, 126 N. C. 971, 36 S. E. 352; 128 N. C. 465, 39 S. E. 55, 83 Am. St. Rep. 699, and monographic note on the effect of changes in by-laws of beneficial associations as against pre-existing members: *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263, 61 N. E. 127. But a member is bound by a reasonable amendment to the by-laws: *Chambers v. Knights of Maccabees*, 200 Pa. St. 244, 86 Am. St. Rep. 716, 49 Atl. 784.

The Failure to Pay Assessments after a void expulsion from a beneficial association does not defeat the member's rights to benefits if he has been notified that the lodge will not receive any more from him, because it no longer regards him as a member: *Langnecker v. Trustees of Grand Lodge etc.*, 111 Wis. 279, 87 Am. St. Rep. 860, 87 N. W. 293.

The Jurisdiction of Courts over voluntary unincorporated societies and associations is discussed in the monographic note to *Kearns v. Howley*, 68 Am. St. Rep. 856-871; and the rights and remedies of members of fraternal and other associations are discussed in the monographic note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198-209. A member of a benefit society cannot bind himself by contract, in advance, to abide by the decisions of the tribunals of the organization and renounce his right to appeal to the courts for the redress of wrongs committed by such tribunals: *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089; *Pepin v. Societe St. Jean Baptiste*, 25 R. I. 81, 91 Am. St. Rep. 620, 49 Atl. 387.

BOYD v. MUTUAL FIRE ASSOCIATION.

[116 Wis. 155, 90 N. W. 1086, 94 N. W. 171.]

CREDITORS' SUIT Against Corporation, What is and What May be Granted in.—An action against a corporation by some of its creditors to have it adjudged insolvent and to wind up its affairs is a creditor's suit under the statutes of Wisconsin, and all the rights of creditors, officers, stockholders, and members must be worked out in that suit. (pp. 952, 953.)

INSURANCE CORPORATIONS.—A Member of a Mutual Insurance Corporation Must be Regarded as in a Similar Position to that of stockholders in such an association. (pp. 953, 954.)

CORPORATIONS—Insurance—Enforcing Liability of Members.—When a corporation is adjudged insolvent and a receiver appointed, the right to enforce liability against its members accrues. (p. 954.)

LIMITATIONS—Statutes of in Favor of Stockholders and Members of a Corporation.—Upon the appointment of a receiver for a corporation which has been adjudged insolvent, a cause of action at once accrues against its members or stockholders for the enforcement of their liability as such, and the statute of limitations thereupon commences to run in their favor. (p. 954.)

LIMITATIONS—Statute of, Runs in Favor of a Defendant Until He is Made a Party to the Action.—If a creditors' suit is commenced against a corporation to which parties defendant are added after its commencement, the statute of limitations continues to run in their favor, notwithstanding the pendency of the action, until they are made parties defendant and summons is issued against them. (p. 955.)

INSURANCE, Mutual, Canceling of by the Insolvency of the Insuring Corporation.—Where an insolvency occurs while policies are outstanding in a mutual fire insurance company, the action of the court in adjudging such insolvency, granting an injunction, and appointing a receiver operates to cancel all existing policies in such company. (p. 955.)

LIMITATIONS, Statute of—Express Trust.—The statute of limitations has no application in the case of an express trust, where there has been no denial or repudiation of the trust. (p. 957.)

PRACTICE—Joint Demurrer Where the Complaint is Good as to Some of the Defendants.—A joint general demurrer to a complaint for insufficiency in behalf of several defendants is bad if the complaint states a cause of action against any of them. (p. 959.)

CORPORATIONS—Receiver of—Cause of Action Against—In Whose Favor Accrues.—If a cause of action accrues against the receiver of a corporation for moneys converted by him to his own use and because of gross misconduct in the management of the receivership, such cause accrues in favor of his successor in office, but not in favor of the creditors of the corporation. (p. 960.)

PRACTICE—Demurrer on the Ground of Misjoinder of Causes of Action.—It is only when a complaint states two or more causes of action that a demurrer lies for misjoinder, and not where an unsuccessful attempt is made to state a second cause. (p. 960.)

PRACTICE—Misjoinder of Causes of Action.—An amended complaint which alleges a cause of action in favor of the creditors of

a corporation and another cause of action in favor of a receiver who has been appointed in the action is subject to demurrer for misjoinder of causes of action. (p. 960.)

CORPORATIONS—Trust Funds.—The officers of a going corporation are not trustees of its creditors, nor are its assets held as a trust fund for them. (pp. 961, 693.)

CORPORATIONS—Creditors' Suit—Defense to.—In an action by creditors of a corporation suing in its behalf the same defenses may be interposed by the defendants as if the suit were brought by the corporation. (pp. 961, 963.)

LIMITATIONS, Statute of.—Where creditors suing in behalf of a corporation seek to enforce a cause of action upon which it might have sued, the statute of limitations bars such suit if it would have barred the suit had it been brought by the corporation. (p. 961.)

CORPORATIONS—Express Trusts.—The Officers and Directors of a Corporation are not Trustees of an Express Trust, and cannot, on the ground that they are such trustees, be held liable to suit on a cause of action against which the statute of limitations has run. (pp. 964, 968.)

LIMITATIONS, Statute of.—In an Action Against Directors and Other Officers of a Corporation brought by its creditors in its behalf to recover for misfeasance and malfeasance in office, the cause of action must be regarded as arising, and the statute of limitations as commencing to run, at the dates of the acts complained of. In this respect the rule is the same whether the suit is brought by the corporation itself or by its creditors suing in its behalf. (p. 969.)

LIMITATIONS, Statute of in Favor of a Plaintiff Subsequently Made a Defendant.—Where a suit is commenced by several plaintiffs against a corporation to have it adjudged insolvent and to wind up its affairs, and some of such plaintiffs are subsequently, by an amended complaint, made parties defendant, with a view to asserting a cause of action against them in favor of the corporation, the action, as to such cause, cannot be regarded as commenced against them prior to the filing of such amended complaint. (p. 971.)

LIMITATIONS, Statute of.—When an Amended Pleading Introduces a Cause of Action, the statute of limitations runs until the making of the amendment. (p. 971.)

Action begun November 13, 1890, by the Northwestern Lumber Company and John S. Owen as creditors in their own behalf, and as representing others similarly situated, against the Mutual Fire Association of Eau Claire, to have it adjudged insolvent and to wind up its affairs. The defendant, on the same day, filed its verified answer admitting the essential allegations of the complaint, and five days later, James A. Smith was appointed and qualified as receiver of the defendant. He was removed June 30, 1899, and one Boyd appointed in his place. The latter, with some of the creditors of defendant, reorganized the action by filing, with the permission of the court, an amended complaint in 1900, in which the original plaintiffs were made defendants and other defendants were added. This amended complaint alleged the incorporation of the defendant

in 1885, under chapter 89 of the Revised Statutes of 1878, and the doing of business by the defendant until it was adjudged insolvent in this suit; that its articles of incorporation provided that all persons holding contracts with the corporation and the heirs, executors, administrators, successors and assigns of such persons continuing to be insured thereby became members of the corporation, and remained such during the continuance of such contracts of insurance, and no longer; that as soon as the corporation was organized, its directors and officers, all of whom were made defendants, agreed to disregard the statutes of the state respecting the manner of doing business, and to pursue a plan of their own, one of the features of which was that no assessment should be made upon any member to meet any liability, which plan was followed until defendant was adjudged insolvent; that two kinds of policies should be issued, one called "cash policies," issued for a single cash premium, covering periods of one year or less; the other kind being issued for three or five years, the policy holder giving a premium note payable in installments as needed and called for by the corporate authority; that from the beginning to the end, all the officers and directors of defendant were interested in the property insured by it, and their aim was to obtain cheaper insurance for themselves, irrespective of the jeopardizing of the interests of outside parties; that such officers and directors charged for carrying risks thirty per cent less than they knew would be necessary, with a view to having such risks carried at a very low rate for a few years and to having the defendant go into insolvency when it was unable to pay its accumulated liabilities; that the scheme worked successfully about two years, the payment of losses being postponed as long as possible and until moneys accumulated from the taking of new risks with which such losses could be paid, and furthermore, by borrowing large sums of money; that the indebtedness accrued in that way amounted to twenty-six thousand dollars; that thereupon the officers and directors planned to have the corporation wind up its proceedings by a suit commenced by creditors, apparently adversary, but in reality, in collusion with the officers and members of the corporation; that to obtain new members and retain old ones, false reports of the condition of the corporation were made from time to time, by which the plaintiffs and others were deluded. Various other facts were alleged, all of the same general nature and intended to show the devices resorted to by the members of the corporation for the purpose

of continuing it in business without making any assessments to meet liabilities. It was further stated that between January 5, 1899, and November 15, 1900, the officers took from the treasury of the defendant more than twenty thousand dollars, which they appropriated to their own use by applying it in payment of their debts; that the defendant Smith, while secretary and manager of the corporation, obtained in fees five hundred dollars, which it was his duty to turn into the treasury, but which he converted to his own use. The persons who constituted each board of directors and each executive committee from the date of the organization of the corporation to the time it was declared insolvent were named in the complaint as defendants. The defendant Smith, it was alleged, was suggested to the court as a proper person to be appointed receiver, and his appointment thereby secured, and after coming into possession of the property, it was claimed, that by previous understanding, he used his possession so as to save harmless from liability the participants in the scheme of which plaintiffs complained. After Smith was appointed receiver in 1890, it was alleged that he acted in pursuance of the purpose for which he had been appointed, and that, by reason of his misconduct, expenses amounting to fifteen hundred dollars were incurred in efforts to remove him and to undo the wrongs done by him; that the amount which would be ultimately realized would be twenty thousand dollars less than it would have been if he had faithfully performed his duties. During his administration an assessment was made in April, 1894, and confirmed by the court in July, 1896, no part of which was paid. In November, 1899, a further assessment of one hundred per cent was made on such of the premium notes in the hands of the receiver as remained uncollected and also on the premium notes wrongfully released after the members were liable to assessment. In January, 1900, this assessment was confirmed by the court, and the receiver directed to collect it. More than thirty days elapsed without any payment of such assessment before the persons liable thereto were brought into this action as defendants. The complaint prayed for judgment for sixty-five thousand dollars and for such relief against each of the defendants as the court should deem just and equitable.

Thirteen demurrers were interposed to the amended complaint, three of them by a single defendant, and the other ten by two or more defendants. Each of the thirteen demurrers was upon this ground, to wit: "1. That it appears upon the face

of said complaint that said complaint does not state facts sufficient to constitute a cause of action as against them or either of them; 2. For that it appears upon the face of said complaint that several causes of action have been improperly united; 3. That it appears upon the face of said complaint that the action was not commenced within the time limited by law, and was not commenced within the time limited by sections 4219, 4221, 4222, 4224, 4227, and 4252 of the Revised Statutes of Wisconsin for the year 1878, and of the Revised Statutes of Wisconsin for the year 1898, reference to which sections is hereby made."

The trial court sustained all the thirteen demurrers, but refused to state the particular grounds upon which they were sustained. Thereupon the plaintiffs appealed from the order sustaining the demurrers and also from the order refusing to state the particular ground upon which they were sustained.

L. A. Doolittle and A. J. Sutherland, for the appellants.

Frawley, Bundy & Wilcox and Wickham & Farr, for the respondents.

¹⁶⁶ CASSODAY, C. J. The numerous claims made against the very numerous defendants, the variety of questions involved, and the mixed condition of the things alleged, have called for ¹⁶⁷ and received the very careful consideration of all the members of the court. For the delay in deciding the case the writer assumes the responsibility. Counsel for the plaintiffs have, in their brief, classified the thirteen demurrers according to the nature of the claims made against the respective demurrants, and numbered them from one to thirteen, consecutively, as they appear in the record. Counsel for the defendants have acquiesced in such classification, and given their views in respect to the same. For convenience, and to avoid confusion, we shall keep in view such classification, but not in the order stated by counsel. The most important question presented is whether the amended complaint states a cause of action, not barred by the statute of limitations, against any of the defendants.

1. Six of the demurrers call upon us to answer the question as to whether such amended complaint states such cause of action against the parties named as demurrants who at one time held policies in the corporation. Under the repeated and recent adjudications of this court there can be no question but

that this must be regarded as a creditors' suit, brought in equity, under the statutes, to wind up the affairs of an insolvent corporation: Stats. 1898, secs. 3216-3228. Such being the nature of the action, all the rights and liabilities of creditors, officers, stockholders, and members were to be worked out in this suit: *Gager v. Bank*, 101 Wis. 593, 77 N. W. 920; *Gager v. Marsden*, 101 Wis. 598, 7 N. W. 922; *Foster v. Posson*, 105 Wis. 99, 81 N. W. 123; *Finney v. Guy*, 106 Wis. 256, 82 N. W. 595; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536; *Gores v. Field*, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411; *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875. Under such statutes the corporation was adjudged insolvent, and a receiver was appointed November 15, 1890. The statute provides: "Whenever any corporation . . . authorized by law to make insurance shall become insolvent or unable to pay its ¹⁶⁸ debts or shall neglect or refuse to pay its notes or evidence of debts on demand or shall have violated any of the provisions of its act of incorporation or of any other law binding on such corporation, any court having jurisdiction may, by injunction, restrain such corporation and its officers," etc.: Sec. 3218.

The statute further provides: "Such injunction may be issued upon the commencement of an action for the purpose of closing up the business of such corporation . . . by any creditor or stockholder of such corporation, or at any time thereafter upon proof of the facts required to authorize the issuing of the same. The court may in any stage of such action appoint one or more receivers to take charge of the property and effects of such corporation and to collect, sue for and recover the debts and demands that may be due and the property that may belong to such corporation, who shall in all respects possess the powers and authority conferred and be subject to all the obligations imposed upon receivers in other cases, and in all respects be subject to the control of the court": Sec. 3219.

So the statute further provides: "Whenever any creditor of any corporation shall seek to charge the directors, trustees or other officers or stockholders thereof on account of any liability created by law, he may commence and maintain an action for that purpose in the circuit court and may at his election join the corporation in such action": Sec. 3223.

In such an action the statute further provides: "If the property of such corporation shall be insufficient to discharge its debts the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares

of stock held by him or so much thereof as shall be necessary to satisfy the debts of the corporation": Sec. 3226.

A member of such mutual insurance corporation must be regarded in a similar position to a stockholder of such association. The corporation having been adjudged insolvent, and a receiver thus appointed, the right to enforce any liability ¹⁶⁹ against its members thereupon accrued. Such, in effect, is a recent ruling of this court: *Booth v. Dear*, 96 Wis. 516, 519-521, 71 N. W. 816. Thus, in an opinion by Mr. Justice Brewer, in the federal court, it was held: "Where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately": *Glenn v. Dorsheimer* (C. C.), 23 Fed. 695.

If a cause of action accrued against any of such members at that time, then the statute of limitations began to run in favor of such member at that time: Stats. 1898, secs. 4219, 4222. Thus it is stated by a standard text-writer: "Where the liability of the shareholder is immediate and primary, and not contingent on the obtaining of a judgment against the corporation, it is clear that the statute of limitations begins to run in favor of the shareholder when the debt matures against the corporation": *Cook on Stock and Stockholders*, 3d ed., p. 301, sec. 225.

It is held in Ohio: "Where a company has become insolvent, and made an assignment of all its property for the benefit of its creditors, the right of the creditors, or any of them, then accrues to commence suit against the stockholders on their liability under the statute, without any prior proceeding against the company, and the statute of limitations begins to run from that time against the right of action": *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259.

To the same effect, *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234; *Davidson v. Rankin*, 34 Cal. 503; *Stilphen v. Ware*, 45 Cal. 110; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594, 596, 37 Pac. 499; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Hollingshead v. Woodward*, 107 N. Y. 96, 13 N. E. 621; *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

170 In a Michigan case it is held: "The statute of limitations begins to run as against such right of action immediately upon the dissolution of the corporation and the appointment of a receiver": *Webber v. Hovey*, 108 Mich. 49, 65 N. W. 619.

Thus it has been held in the supreme court of the United States: "The statute of limitations is a bar to a suit, brought four years after a bank in South Carolina had permanently suspended specie payments, by a holder of its notes, to enforce the individual liability of the stockholders": *Terry v. McLure*, 103 U. S. 442.

We must hold that the statute of limitations began to run in favor of the policy holders in question November 15, 1890. All of such policies were issued between October 14, 1885, and August 1, 1890. None of the defendants who joined in the six several demurrers mentioned were made parties to this action until after May 8, 1900. Until they were so made parties, and the summons issued against them, the statute of limitations did not stop running in their favor; and this is so as to each of the six groups of such defendants. This has recently, in effect, been so decided by this court: *Gager v. Paul*, 111 Wis. 638, 647, 648, 87 N. W. 875. It is unnecessary to add anything to what is there said in the opinion of Mr. Justice Dodge.

As indicated in the statement of facts, twenty-five of such policies were issued and paid for at the time of delivery in cash, and continued for one year or less. The others, and by far the greater number, were issued on the mutual plan, and to continue for three or five years, for which premium notes were given, liable to assessments for losses and expenses from time to time as they accrued. This court has held, in effect, that, where insolvency occurs during the defendant's insurance in such mutual fire insurance company, the action of the court, under the statutes cited, in adjudging such insolvency and granting an injunction and appointing a receiver, operates **171** to cancel such policy and all other existing policies in such company: *Davis v. Shearer*, 90 Wis. 250, 255, 62 N. W. 1050; *Dewey v. Davis*, 82 Wis. 500, 52 N. W. 774. The principle upon which those two cases were decided seems to be applicable here. So there is an additional reason why the statute of limitations began to run against all of such policy holders November 15, 1890; and the right of action was completely barred, as to them, before they were made parties to the action. The nine defendants who joined in demurrer No.

3 at one time held such cash policies which were surrendered before the expiration of the year, and it is here sought to recover from them the unearned premium. We must hold that the complaint fails to state facts sufficient to constitute a cause of action, not barred by the statute of limitations, as against such nine demurrants; and for that reason such demurrer was properly sustained. The same is true with demurrer No. 4, where it is sought to charge the nonresident demurrants with liability on such premium notes given by them for such mutual policies. The same is true with demurrer No. 5, where it is sought to charge a large number of resident demurrants by reason of assessments made upon such premium notes. The same is true with demurrer No. 6, where it is sought to recover from such demurrants unlawful dividends paid to them at various times between 1887 and 1890. The same is true with demurrer No. 11, where it is sought to charge certain resident demurrants by reason of assessments made upon such premium notes, and also to recover back from some of them moneys paid as pretended dividends and unearned premiums. The same is true with demurrer No. 13, where it is sought to charge the demurrant by reason of an assessment upon such premium note for a policy dated December 10, 1888.

2. Five of the demurrers called upon us to determine whether the amended complaint states facts sufficient to constitute a cause of action, not barred by the statute of limitations, ¹⁷² against the officers and directors of the corporation. There can be no question but that the allegations of their misconduct and malfeasance do constitute a cause of action against them. The important question is whether such cause of action is barred by the statute of limitations. Counsel for the plaintiffs claim that the cause of action did not accrue in favor of the creditors who are plaintiffs until they discovered the facts constituting the fraud: Stats. 1898, sec. 4222, subd. 7. To this counsel for the defendants reply that, if there were any facts to prevent the running of the statute, the burden was on the plaintiffs to plead and prove them: *Howell v. Howell*, 15 Wis. 55; *Tucker v. Lovejoy*, 73 Wis. 66, 40 N. W. 627. But there is another view of the question, which seems to be a complete answer to the contention that the statute is a bar to such cause of action. A learned and able text-writer states, in effect, that the correct view, as clearly deduced from the mass of decisions on the subject, is that the officers and directors of a corporation are, in equity, trustees of an express trust for

the benefit of shareholders and creditors, and hence are within the principle that the statute of limitations does not run in favor of such trustees as against the cestui que trust: 3 Thompson's Commentaries on the Law of Corporations, sec. 4128. That such officers and directors are such trustees seems to be well established: *Simons v. Vulcan O. & M. Co.*, 61 Pa. St. 202, 100 Am. Dec. 628; *Pearson v. Concord R. Corp.*, 62 N. H. 537, 13 Am. St. Rep. 590; *Sweeney v. Sugar Refining Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431; *Farmers' etc. Bank v. Downey*, 53 Cal. 466, 31 Am. Rep. 62; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530. This court has expressly held: "The directors and officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to their interests": *Haywood v. Lincoln L. Co.*, 64 Wis. 639, 26 N. W. 184.

The trust-fund doctrine, so-called, recognized in that case, must be regarded as modified so far as creditors of a going ¹⁷³ corporation are concerned: *Ballin v. Merchants' Ex. Bank*, 89 Wis. 286, 46 Am. St. Rep. 834, 61 N. W. 1118; *Hinz v. Van Dusen*, 95 Wis. 503, 507-509, 70 N. W. 657; *Slack v. Northwestern Nat. Bank*, 103. Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51. But there is no doubt but that the managing officers of a corporation are at all times trustees for the corporation and its stockholders, and also for the creditors after the corporation is adjudged insolvent. In fact, our statute on the subject, which is much broader than in some states, provides, among other things, that: "Express trusts may be created: . . . 5. For the beneficial interests of any person or persons when such trust is fully expressed and clearly defined upon the face of the instrument creating it": Stats. 1898, sec. 2081, subd. 5.

The trust in the case at bar was necessarily and from the very nature of the corporation, "fully expressed and clearly defined" in the articles of incorporation. We must hold that the officers and directors of the association were trustees of an express trust. It follows that the statute of limitations did not run in their favor against the creditors of the corporation. This court has expressly held: "The statute of limitations has no application in the case of an express trust where there has been no denial or repudiation of the trust": *Bostwick v. Dickson*, 65 Wis. 593, 26 N. W. 549; *Williams v. Williams*,

82 Wis. 393, 399, 52 N. W. 429; *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405; *Taylor v. Hill*, 86 Wis. 99, 106, 56 N. W. 738.

Counsel for the defendants cite a large number of cases said to be to the contrary, but, so far as we have examined them, they are in actions by the corporation, or its receiver, or are otherwise inapplicable or distinguishable. We must hold that the statute of limitations did not run in favor of any of such officers or directors. The result is that the amended complaint states a good cause of action against the two defendants who joined in demurrer No. 1, since both were directors and one was treasurer. The same is true as to the defendants who joined in demurrer No. 7, including the executors ¹⁷⁴ of the will of D. R. Moon, deceased; and also the defendants who joined in demurrer No. 8, including the administrators of the estate of George B. Shaw, deceased; and also the defendants who joined in demurrer No. 10; and also the defendants who joined in demurrer No. 12, including the executors of the will of Ralph E. Rust, deceased—since in each case such defendants were sought to be charged as officers and directors, or simply as directors, or as the representatives of such officers and directors. We perceive no good reason why such executors and administrators stand in any different position as to the statute of limitations pleaded than the deceased officers whom they represent. True, the defendants who joined in each of the two demurrers last named were only directors from October 15, 1885, to January 13, 1886, but they were liable for whatever malfeasance they were guilty of while in office, notwithstanding they had ceased to be directors before the commencement of the action: 1 *Morawetz on Private Corporations*, sec. 563. The mere fact that the amended complaint seeks to charge the two defendants who joined in demurrer No. 1 as members of the corporation, upon which claims the statute of limitations had run, does not prevent their being held liable as directors. “A demurrer to the entire complaint is properly overruled where it is not good as to one of the causes of action stated”: *Pinkum v. City of Eau Claire*, 81 Wis. 301, 51 N. W. 550.

So it is held: “Where a complaint states a good cause of action as to certain failures of duty on the part of defendant, a general demurrer thereto will not be sustained merely because it attempts, but fails to state other failures of duty”: *Drefahl v. Connell*, 85 Wis. 109, 55 N. W. 160.

Each of the five demurrers last mentioned is based upon another ground, which will hereinafter be considered, and may be sustained.

3. A large number of the members of the corporation, including the Northwestern Lumber Company, joined in demurrer ¹⁷⁵No. 2. The Northwestern Lumber Company was one of the plaintiffs which commenced the action November 13, 1890; and May 8, 1900, by order of the court, it was made defendant instead of plaintiff. Manifestly, the statute of limitations did not run in favor of that company, since it has been a party to the action ever since the suit was first commenced—more than eleven years ago. This being so, the amended complaint stated a good cause of action against that company. Thus it appears that one of the demurrants against whom a good cause of action is stated is joined with a large number of members of the corporation in whose favor the statute of limitations had run. This court has repeatedly held: "A joint general demurrer to a complaint for insufficiency on behalf of several defendants is bad if the complaint states a cause of action against any one of them": *Mark Paine Lumber Co. v. Douglas County Imp. Co.*, 94 Wis. 322, 325, 68 N. W. 1013, and cases there cited.

The result is that we must hold that the amended complaint states a cause of action against the defendants who joined in demurrer No. 2. But that demurrer is based upon another ground, which will hereinafter be considered, and may be sustained. It will be observed that each and every of the twelve causes of action mentioned was in favor of the creditors of the corporation.

4. The remaining demurrer, No. 9, is interposed by James A. Smith, who was appointed receiver November 15, 1890, but who was never an officer or director of the corporation. The amended complaint seeks to charge him with having, prior to May 15, 1891, and while he was such receiver, wrongfully converted to his own use five hundred dollars belonging to the corporation; and also with having obtained, without consideration, on November 12, 1890, and before his appointment as receiver, two hundred and eighty-one dollars and seventy-three cents, belonging to the corporation, and converting the same to his own use; and also with gross misconduct ¹⁷⁶in managing the receivership, whereby large sums of money were lost to the corporation. The facts alleged in the amended complaint are sufficient to constitute a cause of action against James A.

Smith and in favor of the receiver Boyd, but not in favor of the creditors of the corporation. It therefore stands as an independent action in favor of the receiver and against Smith. His demurrer, however, like the other demurrers, is based upon another ground, which will now be considered.

5. Each of the several demurrers is in part upon the ground that it appears upon the face of the amended complaint that several causes of action have been improperly united. As indicated, the amended complaint fails to state facts sufficient to constitute a cause of action as against the defendants named in any one of the six demurrers first considered. It is well settled that they are not to be considered in determining whether several causes of action have been improperly united: *Bassett v. Warner*, 23 Wis. 673; *Truesdell v. Rhodes*, 26 Wis. 215; *Willard v. Reas*, 26 Wis. 540; *Lee v. Simpson*, 29 Wis. 333; *Schiffer v. Eau Claire*, 51 Wis. 385, 8 N. W. 253; *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721. It is only where the complaint states two or more good causes of action that a demurrer will lie for misjoinder. As indicated, the amended complaint states a good cause of action in favor of the creditors and against the defendants named in six of the demurrers, and also states a good cause of action in favor of the receiver Boyd and against the defendant James A. Smith. Is this independent cause of action in favor of Boyd properly joined with the causes of action in favor of the creditors? Under the repeated rulings of this court we must answer in the negative: *Barnes v. Beloit*, 19 Wis. 93; *Pier v. Fond du Lac Co.*, 53 Wis. 432, 10 N. W. 686; *Shanahan v. Madison*, 57 Wis. 276, 283, 15 N. W. 154; *Linden Land Co. v. Milwaukee E. R. & L. Co.*, 107 Wis. 493, 508, 509, 83 N. W. 851. It follows from what has¹⁷⁷ been said that demurrers numbered 1, 2, 7, 8, 9, 10 and 12 were each and all properly sustained, but only upon the ground that several causes of action are improperly united.

By the Court. The appeal from the order of the circuit court refusing to state the grounds upon which such demurrers were sustained is dismissed. The several orders of the circuit court sustaining such demurrers are each and all affirmed, and the cause is remanded for further proceedings according to law.

On motion of respondent a rehearing was granted and further argument heard, after which the further opinion of the court was delivered by

BARDEEN, J. A rehearing of this case was granted on the sole question of whether the statute of limitations had run in

favor of the officers and directors of the defendant corporation. In the opinion (116 Wis. 155, 90 N. W. 1087) this court held that such statute had not run, basing such holding upon the proposition that such officers and directors were trustees of an express trust. We are now urged to reconsider and recede from that position.

It abundantly appears from the complaint that more than six years had elapsed between the time of the commission of the acts for which such officers and directors are sought to be held liable and the date they were made parties to this action, so that, unless they are brought within some rule which prevents the running of the statute, they may invoke it, and thus resist the claims sought to be enforced against them. Strictly speaking, this action is not one in which the creditors are seeking to hold the officers of the corporation as trustees for themselves. It is rather an action in the right of the corporation itself, and brought by the creditors on its behalf ¹⁷⁸ because the corporation cannot or will not sue. It was not intended, nor can it be fairly inferred from the former opinion that we held, that the officers of a going corporation were trustees of creditors. We do not intend to abate one jot or tittle from the rule now firmly established in this state on the so-called "trust-fund doctrine." The recent cases of *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51, *Killen v. Barnes*, 106 Wis. 546-572, 82 N. W. 536, and *Hamilton v. Menominee F. Q. Co.*, 106 Wis. 352, 81 N. W. 876, sufficiently indicate the position of this court, and by that position we are still disposed to stand. This action, being one in the right of and on behalf of the corporation, is open to any defense which the defendants might have urged, had the corporation itself brought the suit. The acts alleged against the officers are of misfeasance and malfeasance. No doubt can reasonably be entertained but that the corporation might have brought an action at law at any time within six years after the commission thereof. As between the corporation and its officers, the latter were liable in a straight action at law any time during the six years next after their shortcoming. It is not perceived how the fact that creditors must bring their suit in equity, when the corporation cannot or will not act, changes the relations of the parties. The creditors possess no greater right than the corporation. They are bound by the legal status of the parties, and cannot maintain this action unless the relation between the

corporation and its officers is held to be such as to render the six years statute of limitations inapplicable.

We have now reached the very heart of the controversy between the parties. The general rule of law was correctly stated in the opinion that "the statute of limitations has no application in the case of an express trust, where there has been no denial or repudiation of the trust." If, therefore, the officers and directors of a corporation are indeed trustees of an express trust, as heretofore held, that ends the controversy. ¹⁷⁹ We are convinced, however, that we stated the rule too broadly in the former opinion. The rule quoted from Thompson on Corporations is not fully supported by the authorities. It is not easy to define with exactness the precise relation existing between a corporation and its stockholders, on the one side, and the officers and directors, on the other. The latter are certainly not trustees of an express trust, under the statute mentioned in the opinion. In *Lamberton v. Pereles*, 87 Wis. 449, 459, 58 N. W. 776, this court by the present chief justice, said: "In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property."

The officers of a corporation have no title to its real property, so that they do not become express trustees under the statute. Neither have they the legal title to either the personal property or the stock of the corporation. Their relation to the corporation is thus defined in 2 Pomeroy's Equity Jurisprudence, section 1089: "The directors and supreme managing officers of corporations are constantly spoken of as trustees. They are not, however, true trustees, with the corporation or the stockholders as their true *cestuis que trustent*, since they hold neither the legal title to the corporate property, nor that to the stock. In fact, directors are clothed at the same time in a double character—that of quasi trustees and that of agents."

The English court, in *Ex parte Chippendale*, 4 De Gex, M. & G. 19-52, speaking of this relation, says: "Although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees."

The supreme court of Pennsylvania, considering this same question, said: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that, ¹⁸⁰ as I apprehend, is only in a general sense, as we term an agent or any bailee intrusted with the care and man-

agement of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries," etc.: *Spring's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684.

The Tennessee court speaks of the matter thus: "Directors are not express trustees. . . . They are mandataries. They are agents. They are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith": *Wallace v. Lincoln S. Bank*, 89 Tenn. 630-649, 24 Am. St. Rep. 625, 15 S. W. 448. See *Pearson v. Concord R. Corp.*, 62 N. H. 537, 13 Am. St. Rep. 590; *Bank of Mutual Redemption v. Hill*, 56 Me. 385, 96 Am. Dec. 470; *Landis v. Saxton*, 105 Mo. 486, 490, 24 Am. St. Rep. 403, 16 S. W. 912.

Expressions of this kind without number might be cited without getting any nearer exactitude of definition of this relation. No court that we are aware of has ever defined the relation as broadly as was stated in the former opinion by this court. We therefore withdraw the statement that such officers and directors are trustees of an express trust, as defined by section 2081, Statutes of 1898.

We will now take up the question of whether their relation is such that, under the circumstances alleged in the complaint, they cannot avail themselves of the benefit of the statute of limitations. At this point we are met by a divergence in the authorities. One line of cases, of which *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, is a type, holds that the managers of a savings bank stand in the relation of trustees to depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part which had occurred more than six years before the filing of the bill: See *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Southern M. Ins. Co. v. Pike*, 32 La. Ann. 483; *Coxe v. Huntsville G. L. Co.*, 106 Ala. 373, 17 South. 626; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412. The ruling in the New Jersey case seems to have been based expressly upon the holding that the relation between the directors¹⁸¹ and depositors (who were mere creditors) was similar to that of trustee and cestui que trust, and that the right of the depositor was a purely equitable one, which he could not enforce in a court of common law: *Williams v. McKay*, 40 N. J. Eq. 198, 53 Am. Rep. 775. It is perfectly evident that this court cannot follow this decision without overruling a large line of cases repudiating the trust-fund doctrine. Neither the corporation nor its governing body, so long as it

is a going concern, holds its property in trust for creditors. The officers or directors occupy a fiduciary relation, demanding care, vigilance, and good faith. If they violate their duty, they at once become responsible to the corporation. If they are guilty of misfeasance or malfeasance, the latter may at once bring an action at law to enforce such liability. If the corporation refuses to act, the stockholders before insolvency, and the creditors after insolvency, may enforce such liability in the right of the corporation, and not otherwise. Such right is not based entirely upon the relation of trusteeship sustained to the creditors, but rather upon the legal right of the corporation to compel them to make reparation for their wrong. The right of the creditor to enforce the rights of the corporation may be said to rest upon the so-called fiduciary relation which the officers sustain to the corporation, and indirectly to them. The fact that the creditor must sue in equity does not alter the situation. The application of the statute of limitations in equity is determined by the cause of action stated, rather than by the nature of relief demanded: *Hughes v. Brown*, 88 Tenn. 578, 587, 13 S. W. 286. The cause of action stated in the complaint being one in the right of the corporation, and one which it might have enforced in an action at law, it becomes susceptible to such objections as the recalcitrant officers might have urged, had the corporation brought the suit.

The case of *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530, much relied upon, is bottomed upon two facts which this court cannot recognize as substantial. One is "that the assets of a ¹⁸² corporation are, in equity, a trust fund," and the other is that the relation between the officers and the corporation has "all the elements of an express trust." The case of *Southern M. Ins. Co. v. Pike*, 32 La. Ann. 483, was one where the directors intrusted the accounts and assets of the company to one who united in himself the offices of president and cashier, and who died without rendering an account of his trust. The court held that prescription did not run on a demand for a return of the property until the heir had done some act equivalent to a repudiation of the trust. We have no quarrel with the holding. *Coxe v. Huntsville G. L. Co.*, 106 Ala. 373, 17 South. 626, simply holds that the right of a corporation to require an accounting from its president, who was also its general manager and controlled and managed all its affairs for many years, cannot be barred by the statute of limitations when it is shown that the failure to assert the right sooner was due to

the refusal of said officer to allow an examination of his books, and to his deception and misrepresentation as to the condition of corporate affairs. The decision rests upon the fraud of the officer, and misrepresentation to the governing body. The case of *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412, may be dismissed with the following quotation from the opinion: "As to the statute of limitations, it need only be said that this is a case of a direct trust, purely technical, not cognizable at law, but falling within the proper, peculiar, and exclusive jurisdiction of a court of equity."

This review of the authorities cited in support of the appellants' position is sufficient to show the difficulty this court must experience in attempting to follow them. On the other hand, there is a clear line of authorities taking a contrary view. In the case of *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, Chancellor Kent speaks on the subject as follows: "The objection that the society held the money in question in the character of trustees, and that it was a trust which, upon equity principles, was not within the statute, has been ¹⁸³ the main object of discussion in the cause; and there is ground for a good deal of embarrassment in the examination of the question, arising from the loose manner in which the rule is often mentioned in the books, and the want of consistency, as well as precision, in the series of cases applicable to the point. I cannot assent to the proposition that all cases of direct and express trust, and arising between trustee and cestui que trust, are to be withdrawn from the operation of the statute of limitations, notwithstanding a clear and certain remedy exists at law. The word 'trust' is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity, as a trustee, for a breach of trust: *Scott v. Surman*, Willes, 404. The reciprocal rights and duties founded upon the various species of bailment, and growing out of those relations, . . . are all cases of express and direct trust. . . . Are all such cases to be taken out of the statute of limitations, under the notion of a trust, when one of the parties selects his remedy in this court? A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine, and to establish upon the solid foundations of authority and policy this rule: That the trusts intended by the

courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court."

From his view of the authorities, it may be said that as long as there is a continuing and subsisting trust, acknowledged or acted upon by the parties, the statute does not apply, but if the trustee denies the right of his cestui que trust, and the holding becomes adverse, lapse of time from that period may constitute a bar in equity, but other trusts which are the ground of an action at law are not exempted from the operation of the statute. *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837, was an action by the receiver of an insolvent insurance company to compel a trustee (holding the same office as a ¹⁸⁴ director under our statutes) to account for assets fraudulently misapplied by him. The court held that the receiver, as the representative of the corporation, might have sued the defendant, in an action at law, for the damages sustained from his misconduct, or in equity, as he did, to compel an accounting as to the property wasted and lost; that such action was barred by the lapse of six years between the misapplication and the commencement of the suit. *Pierson v. McCurdy*, 33 Hun, 520, affirmed in 100 N. Y. 608, 2 N. E. 615, holds pretty much the same doctrine. *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448, was a suit against the officers and directors of a corporation for losses caused by their neglect and mismanagement of the corporate affairs. The following propositions were decided: That primarily such a suit was maintainable at law by the corporation alone, but creditors might maintain the action in equity when the corporation was disabled to sue or wrongfully refused to sue; that such suit, whether brought at law by the corporation itself, or in equity by a creditor, was alike subject to the bar of the statute of limitations; and that the six year statute was the one that was applicable. So, in a later case (*Cullen v. Coal Creek M. & M. Co. (Tenn.)*, 42 S. W. 693) a demurrer to a bill against directors of a corporation for malfeasance in office was sustained after the lapse of six years, on the ground that such directors were not such direct or technical trustees as to take the case without the statute: See *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286. The supreme court of Missouri followed substantially the same rule in an action brought against the secretary of a corporation for withholding money of the concern: *Landis*

v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 406, 16 S. W. 912. In Indiana the rules above mentioned were applied in an action against public officers to recover moneys received by them under color of their offices; the court holding that, when money can be recovered in an ordinary action at law, the statute of limitations was a valid defense: *Newsom v. Commissioners*, 103 Ind. 526, 3 N. E. 163. In *Baxter v. Moses*, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350, it is said that the directors of a corporation hold the corporate property under an implied or constructive trust, and that one who is not actually a trustee, but upon whom the character is forced by a court of equity, may avail himself of the statute of limitations: See *Link v. McLeod*, 194 Pa. St. 566, 45 Atl. 340. Upon mature deliberation, we are disposed to adopt the view of the latter line of cases. It is plain that, however the relations of corporate officers to their corporation and its stockholders may be defined, such relations are not "technical and continuing trusts," cognizable solely in a court of equity, which Chancellor Kent declares are the only trusts not affected by the statute of limitations. The various causes of action stated in the complaint for misapplication of funds were rights of action in favor of the corporation, upon which actions at law could have been commenced when the act was done. The plaintiffs here are simply seeking to enforce the right of action of the corporation. They have no greater right than it possessed.

Our statute (section 4206) is general and comprehensive, and in itself makes no exception as against trustees of any kind; and, while we are not inclined to deny or question the authority of the precedents in this court importing into that statute certain exceptions, we are unwilling to assume a practically legislative function, by adding other exceptions which we might deem wise, which the legislature, in the exercise of its constitutional discretion, has not seen fit to make. Those precedents are cited in the former opinion. Several of them go nearly to the extent of exempting express trusts within the statute, but two of them suggest like exception in certain other cases: *Howell v. Howell*, 15 Wis. 55, and *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405. The first of these is of but little significance, for in it was no attempt to declare how far the exemption from statutes of limitation does extend, but merely that it does not extend beyond "express ¹⁸⁶ or acknowledged trusts," and liability to account for proceeds of land wrongfully purchased with moneys of plaintiff

was held barred by limitation. In *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405, however, the limitation was extended to a resulting trust arising upon purchase of land in his own name by a husband with his wife's money, such resulting trust having been acknowledged by him, and having continued unrepudiated during their cohabitation to his death. The statute was held not to apply, because the trust was wholly beyond cognizance of courts of law, and had the characteristics of acknowledgment, continuance, and certainty. Chancellor Kent's classification of trusts in *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, was adopted; among other parts, the declaration being that "other trusts which are the ground of action at law are not exempt." It seems plain, therefore, that nothing in the prior decisions of this court have established immunity from limitation statutes in favor of any trusts, other than "those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this [chancery] court," as classified by Chancellor Kent. Obviously corporate officers are not trustees holding upon such a trust. It is not meant by this that they may not be, in a true sense, trustees of an express trust. While express trusts in real property can only be such as are defined and limited by section 2081 of the Statutes of 1898, there may be many express trusts in personal property, as pointed out by Chancellor Kent in the case above cited, which are entirely independent of the trusts in real property referred to in section 2081. It may well be that corporate officers, so far as they handle and control the personal property of the corporation, may rightly be called trustees of an express trust, of which trust the corporation and its stockholders are the beneficiaries: 1 *Perry on Trusts*, 5th ed., sec. 86. But so far as they may be sued at law, they do not come within the chancellor's classification, and hence the running of the statute of limitations is not interrupted. ¹⁸⁷ As already pointed out, their misapplication of funds might at any time have been reached by an action at law by the corporation. The right to sue arose when the act was done. If the alleged conspiracy as to mismanagement continued down to the death of the corporation, still, as we understand it, the demurring defendants were not made parties to this suit until more than six years thereafter. An action at law might have been instituted by the receiver immediately after this appointment, as to all acts not then barred by the statute: *Mason v. Henry*, 152 N. Y. 529, 46

N. E. 837; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

We are fully impressed with the weight of the reasons supporting and opposing such exemption as is claimed in this action against directors and officers of corporations. The peril to the public in becoming either stockholders or creditors, in view of the ample practical opportunity enjoyed by such officers to cover their malfeasance from the knowledge of any person other than themselves, and to control the action of the corporation, whether by way of investigation or suit, until the period of limitations shall have run, is a cogent consideration. On the other hand, in absence of limitation, such officers, and their estates after them, may be held liable for mere negligence at remote periods after their acts, when witnesses may be dead and books and records lost, so that defense against a *prima facie* case may be impossible, contrary to the policy of the law in all analogous situations. But after all, these are considerations of policy, with which the legislature can deal freely; and we feel induced to hold that as neither the statute nor the precedents of this court warrant exception from the protection of the limitation statutes of those who, though holding as fiduciaries and trustees, have at all times been liable to remedy by suit at law for their misconduct as such, we may not with propriety take from them that protection which the statute, in terms, gives. We hold, ¹⁸⁸ therefore, that the limitation has run, and the action, in the respects mentioned, is barred, upon the allegations of the complaint. The five demurrers mentioned in the former opinion, in subdivision 2, are therefore sustained on the ground herein stated, and such opinion is hereby modified accordingly.

By the Court. So ordered.

CASSODAY, C. J., dissenting. It is well settled that so long as there is a continuing and subsisting trust acknowledged or acted on by the parties, the statute of limitations are not available to a trustee: *Kane v. Bloodgood*, 7 Johns. Ch. 90, 123, 124, 11 Am. Dec. 417. The reason for the rule is that the trustee being clothed with the legal title or possession of the property, and charged with the duty of caring for and preserving the same for the benefit of the *cestui que trust*, the latter has the right to assume that the trustee will perform such duty, unless he has knowledge that the trustee has denied his right, or claimed the possession of the property adversely to him.

Until such denial or adverse claim, the possession of the trustee is, in equity, deemed to be the possession of the cestui que trust: *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9; *Lindsley v. Dodd*, 53 N. J. Eq. 69, 84, 30 Atl. 896. True, the officers and directors of a corporation are not regarded, in law, as having the title or possession of the property of the corporation, both of which are deemed to be vested in the corporation itself. Nevertheless they have the actual care and custody of such property, and are chargeable in equity with an active duty in respect to the same, not only for the benefit of the corporation, but also for the benefit of the cestui que trust. When, therefore, such officers and directors, in violation of such duty, convert a large portion of the property of the corporation to their own private use, and there is no publicity of the fraud, they necessarily become chargeable in equity, as trustees of the property so fraudulently ¹⁸⁹ converted, for the benefit of the cestui que trust. As to the property so converted, they hold the same as a continuing and subsisting trust, assumed and acted upon by themselves in violation of the duty to the cestui que trust. The mere fact that an action might have been maintained in the name of the corporation which was managed and controlled by the wrongdoers, against such wrongdoers, to recover back the money or property so converted, immediately after the conversion took place, is no ground, in my judgment, for holding that the statute of limitations commenced running in favor of such wrongdoers and against the plaintiffs at the time of such conversion. Thus, it is held in New Jersey: "The managers of a savings bank stand in the relationship of trustees to the depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part which had occurred more than six years before the filing of the bill": *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775.

Again: "The treasurer of a savings bank, who was at the same time one of its managers, was charged by the receiver of the bank with dereliction and malfeasance in office. Held, that his position as manager made him a trustee, and that consequently the statute of limitations was not a defense to the bill": *Williams v. Reilly*, 41 N. J. Eq. 137, 3 Atl. 692.

These cases were followed in *Somerset Co. Bank v. Veghte*, 42 N. J. Eq. 39, 42, 6 Atl. 278; *Williams v. McDonald*, 43 N. J. Eq. 392, 396, 7 Atl. 866. So in a case in Illinois it is said in the opinion of the court: "Ordinarily, an express trust is created by a deed or will; but there are many fiduciary relations

established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable, and such appears to be the relation established by law between directors and the corporation": *Ellis v. Ward*, 137 Ill. 509, 520, 522, 25 N. E. 530. See, also, *Coxe v. Huntsville Gaslight Co.*, 106 Ala. 373, 17 South. 626; *European etc. Ry. Co. v. Poor*, 59 Me. 277, 278; *Butts v. Wood*, 38 Barb. 188; *Williams v. Page*, 24 Beav. 654.

¹⁹⁰ In my judgment, there is less reason for holding that the statute of limitations runs in favor of such officers and directors in the case at bar than in a number of cases in this court wherein it has been held that the statute did not run by reason of such fiduciary or trust relation: *Sheldon v. Sheldon*, 3 Wis. 699; *Spear v. Evans*, 51 Wis. 42, 8 N. W. 20; *Bostwick v. Dickson*, 65 Wis. 593, 26 N. W. 549; *Second Nat. Bank v. Merrill*, 81 Wis. 151, 50 N. W. 505; *Williams v. Williams*, 82 Wis. 393, 52 N. W. 429; *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405; *Taylor v. Hill*, 86 Wis. 106, 56 N. W. 738.

Such is a brief statement of a few of my reasons for dissenting from the decision on the motion for a rehearing in this case.

The following additional opinion was filed April 17, 1903:

Per CURIAM. One point suggested upon the rehearing is not mentioned in the foregoing opinion and deserves brief consideration. It is said that the defendant, John S. Owen, a director of the corporation, who is charged with liability by the amended complaint, was a party to the action from the beginning, and hence that as to him the statute of limitations is not available as a defense. It is true that Owen was one of the plaintiffs in the action as originally brought in his capacity as an alleged creditor of the corporation; but the difficulty with the contention is that the action as originally brought was simply a plain action to wind up the corporation and distribute its assets, and did not include any cause of action against Owen, or any other officer, for maladministration, or to recover assets converted. No such cause of action was incorporated into the complaint until the reorganization of the action in May, 1900, when Owen and his coplaintiff were made defendants, and the amended complaint was served. Therefore no action to enforce such liabilities ¹⁹¹ can logically be held to have been commenced against Owen until such amended complaint was served. It is well settled that, when an amendment to a plead-

ing introduces a new cause of action, the statute of limitations runs until the making of the amendment: 1 Ency. of Pl. & Pr. 622, and cases cited in note 1; Gager v. Paul, 111 Wis. 638, 87 N. W. 875. See, also, Chicago etc. Ry. Co. v. Young (Neb.), 93 N. W. 922.

THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST OFFICERS AND STOCKHOLDERS OF CORPORATIONS.*

I. Actions Against Stockholders.

- a. Nature of the Liability.
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II. Actions Against Subscribers.

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 2. Notes "on Demand" Given for Subscriptions.
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- c. How Far Judgment and Execution Against the Corporation are Necessary.
- d. Suspension of the Statute by Unauthorized Act of Officer.
- e. Right of Creditor to Sue Where the Corporation is Itself Barred.

III. Against Officers.

- a. Failure to Perform Statutory Duties.
 1. Liability Considered Penal.

*REFERENCES TO MONOGRAPHIC NOTES.

Statute of limitations in actions to recover unpaid stock subscription: 3 Am. St. Rep. 827.

Statute of limitations in action to enforce stockholder's personal liability: 3 Am. St. Rep. 872.

2. **Opposite View.**
3. **When the Right of Action Accrues.**
4. **Judgment Against the Corporation, and Renewal of Indebtedness Suspending the Statute.**
5. **Effect of Successive Defaults.**
- b. **Officers of a Corporation as Trustees.**
 1. **View Holding Them Such.**
 2. **Opposite View.**

I. Actions Against Stockholders.

a. Nature of the Liability.—There have been enacted in the different states of this country statutes whose object is to render the stockholders in corporations liable for corporate debts, the purpose being to afford better protection to creditors. While a cause of action to enforce this individual liability is thus given, the time within which it must be brought has been generally left to judicial determination, and the results have been anything but harmonious.

It first of all becomes important to determine the nature of the action, for if it be held to be one arising from contract, it is within the statute of limitations governing that class of action, while if it be held a tort action it naturally falls into another category, and so on.

In *Hutchings v. Lampson*, 82 Fed. 960, it is held that such liability for corporate debts is based on an implied promise, under the laws of Kansas, and governed by that statute; and the same was held in *Lindsay v. Hyatt*, 4 Edw. Ch. 97, where an action on a corporation's bond was brought and was held a debt, and not an equitable action; and see *Corning v. McCullough*, 1 N. Y. 47, 589, 49 Am. Dec. 287.

There are cases, however, opposing this view. In *Andrews v. Bacon*, 38 Fed. 777, the liability is held not contractual, but statutory. See, also, *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507. Such liability is held one created by law in *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670, citing *Green v. Beckman*, 59 Cal. 545; *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335; *Bank v. Pacific Coast etc. Co.*, 103 Cal. 594, 37 Pac. 499.

Where a statute of limitations provided that all actions of debt grounded upon any lending or contract without specialty should be barred within five years, it was held not to apply to a contract imposed by law, as stockholders' liability: *Bank of United States v. Dallam*, 34 Ky. (4 Dana) 574. In *Carrol v. Green*, 92 U. S. 509, it was held to arise as in an action on the case.

The imposition of such liability is not a penalty, but is a specialty, the statute relating to penalties applying only to those which are strictly so: *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039. See, also, *Thornton v. Lane*, 11 Ga. 459. In *Freeland v. McCullough*, 1 Denio, 414, 43 Am. Dec. 685, it is considered an action upon a statute for the benefit of the party aggrieved. But see *Van Hook v. Whitlock*, 26 Wend. 43, 37 Am. Dec. 246.

Where the members of a corporation are made individually liable for issuing unauthorized bank paper, such liability is a penalty, and barred in four years, and not contractual, so as to be barred in fifteen years: *Lawler v. Burt*, 7 Ohio St. 340, overruling *Lawler v. Walker*, 18 Ohio, 151.

A statute fixing the time for suing stockholders in a corporation does not apply to a partnership, though it have a board of directors and its members are designated as stockholders; *Campbell v. Floyd*, 153 Pa. St. 84, 25 Atl. 1033, 32 Week. Not. Cas. 1.

b. When the Statute Commences to Run.

1. While Still a Stockholder.

A. Where the Liability is Primary.—It next becomes necessary to determine when the statute of limitations starts to run, and this depends to a great extent upon the nature of the liability. One line of cases holds that it is primary and coeval with the liability of the corporation itself; that it does not depend upon the liability or refusal of the corporation to meet its obligations: *Davidson v. Rankin*, 34 Cal. 503; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; and the liability between the members thereof is the same as if they were doing business as partners, except that the liability of each is limited: *Fuller v. Ledden*, 87 Ill. 310. The right of action against them continues as long as it does against the corporation: *Fleischer v. Rentchler*, 17 Ill. App. 402.

Under a California statute providing that an action against a stockholder must be brought within three years after the liability was "created," the liability on a note made by a corporation is held to have been created when executed, and not when due, so that the statute begins to run from the former date: *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335. The court there said: "It is sought to overcome the plain language of the code by supposing a case where the corporation had given a note not due until more than three years after date, and suggesting that in such a case the statute would have run against the stockholders before the accruing of any right of action against them. But if we assume that in such a case, according to respondent's view, the stockholders could be sued only upon the note, still the situation—called by counsel 'an anomalous condition of affairs'—would be the result of the voluntary act of the creditor done in the face of the law. Such a condition of affairs would not be the necessary outcome of the law; for the code gives the creditor ample room and time to subject stockholders to their independent liability for the indebtedness of the corporation. But if he chooses to make a contract with the corporation, by which its payment of the indebtedness is postponed beyond the three years' limitation in favor of the stockholders, he simply does an act which practically waives his right against the latter—assuming, of course, that his only cause of action against the stockholder is upon the note

of the corporation. It must be remembered that the right to pursue the stockholder at all does not exist at common law; and that it must be exercised upon the conditions and within the limits which the written law prescribes."

In *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039, the court held that to say the statute begins to run when the liability is incurred, and not when a right of action accrues to the creditor is absurd, and mentions the case of a note or bond, not due for the length of the statutory period.

B. Where the Liability is Secondary.—Another line of cases, and the stronger numerically, is to the effect that the liability of stockholders is merely secondary; that it is enforceable only in the event of the corporation itself being unable to meet its debts; and that until that time the statute does not commence to run, but only from the time an unsatisfied execution against the corporation is returned: *Hale v. Cushman*, 96 Me. 148, 51 Atl. 874; *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874; *Christensen v. Quintard*, 36 Hun, 334; *Christensen v. Colby*, 43 Hun, 362; *Merritt v. Reid*, 10 Daly, 311; *Handy v. Draper*, 89 N. Y. 334; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259; *Brownson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233; *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039; *Powel v. Oregonian Ry. Co.*, 38 Fed. 187; *Bank of North America v. Rindge*, 57 Fed. 279; and in *Bowker v. Hill*, 115 Fed. 528, it was held that execution against the corporation must be returned unsatisfied before a bill would lie against a stockholder to recover dividends improperly paid.

Such proceedings against the corporation are not necessary where it is insolvent, as that would be requiring a vain act: *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259; *Bronson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234. In the former case it was held that although the company might not be able to meet all its debts, if it was carrying on business the stockholders could not protect themselves by claiming that the statute had run in their favor because of insolvency, the court saying: "So long as the company is possessed of corporate property and continues to transact its business, the stockholders should be regarded as estopped from averring that the right of action against them as individuals accrued, by reason of the insolvency of the company, at a period earlier than the return of an execution unsatisfied, issued upon the judgment of a creditor of the company. Stockholders have the means of knowing the condition of their company much better than creditors, and if the company continues to do business upon an insolvent basis, it should be regarded as permitted by the stockholders, as the directors and officers of the company derive their authority from, and are the agents of, the stockholders."

Where by statute the corporation and stockholders may be sued together, the statute of limitations in favor of the stockholders runs the moment the action accrues against the company: *Conklin v. Furman*, 48 N. Y. 527. See, also, I, b, 4, herein.

In *Walton v. Coe*, 47 Hun, 160, it was held that where by statute an action in favor of a creditor accrued against a stockholder as soon as an action against the corporation had been begun, judgment against the former could not be realized on until execution against the corporation had been issued and returned. "It is true that this construction leads to anomalous results, as if the creditor should recover a judgment against the stockholders but should never recover a judgment against the company, he could never issue execution upon his judgment against the stockholder, but such judgment would nevertheless remain a cloud upon the stockholder's credit, and a lien on his real estate which could only be discharged by payment."

If the sheriff fails to make a return, the creditor must, within a reasonable time, proceed to secure the return, and the statute then begins to run: *Mills v. Hicks*, 44 N. Y. Super. Ct. (12 Jones & S.) 527.

As to when a right of action accrues against a stockholder after an unsatisfied judgment against the corporation, see *Cummings v. Maxwell*, 45 Me. 190; *Lovegrove v. Brown*, 60 Me. 592.

C. Where a Surety Pays a Corporate Debt.—Where a surety pays the debt of a corporation, the statute commences to run from the day of payment, and not from the date of the obligation: *Ryland v. Commercial etc. Bank*, 127 Cal. 525, 59 Pac. 989. In that case a surety paid a note of a corporation before it was barred as to the corporation, but after three years from its date, that being the period within which an action to enforce the individual liability of stockholders must be brought. This was held not to release the stockholders from their liability to the surety, although the payee of the note would have been barred by lapse of time from recovering against the stockholders. "The statute of limitations, as against the payee, began to run in favor of the stockholders of the wine company at the date of the notes; but as there was as yet no liability of the stockholders to the sureties there was nothing, so far as concerned the sureties, for the statute to operate upon. The statute could not be set in motion against the sureties until a liability to them had arisen, and no liability arose until they paid the debt of their principal or some part of it."

D. Rights of Subrogated Stockholder.—A stockholder who has paid off a debt of the corporation may be subrogated to all the rights and remedies of the creditor as against the other stockholders; but his action will be barred in the same time that it would have been had the creditor sued the stockholders on their individual liability for that debt: *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40.

E. Where the Corporation is Insolvent or Dissolved.—Where the stockholders of a banking corporation are made liable in case of in-

solvency or ultimate inability to pay, the statute of limitations begins to run when the bank ceases to redeem its obligations and is notoriously insolvent: *Long v. Bank of Yanceyville*, 90 N. C. 405; *Terry v. Tubman*, 92 U. S. 156; *Terry v. Anderson*, 95 U. S. 628; *Terry v. McLure*, 103 U. S. 442; and its failure bears date from its first and continued refusal and inability to pay: *Godfrey v. Terry*, 97 U. S. 171.

Where it is provided by statute that creditors may maintain an action against stockholders for debts of the corporation upon its dissolution, the statute runs from that time: *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519. And where it is also enacted that suspension of business for more than one year is equivalent to dissolution, the statute does not begin to run till dissolution or facts equivalent thereto: *Chase v. Bank of Horton*, 9 Kan. App. 186, 59 Pac. 39; a formal judgment of dissolution being unnecessary: *Platt v. Hungerford*, 116 Fed. 771. Such suspension means ceasing to carry on the ordinary business of the corporation, and does not cease by its officers performing the business necessary to wind up its affairs: *Jones v. Edson*, 10 Kan. App. 110, 62 Pac. 249; *Jones v. Slonecker* (Kan.), 71 Pac. 573.

A general assignment for the benefit of creditors and a cessation of business is such a dissolution as to give creditors of a corporation a right of action against its stockholders, the statute running from then on: *McDonnell v. Alabama etc. Ins. Co.*, 85 Ala. 401, 5 South. 120.

In *Hilliker v. Hale*, 117 Fed. 220, 54 C. C. A. 252, citing *Olson v. Cook*, 57 Minn. 552, 59 N. W. 635, construing a Minnesota statute, it was held not necessary that the corporate assets be fully administered and the deficiency ascertained before a right of action against the stockholders accrued. And see *Commonwealth v. Cochituate Bank*, 85 Mass. (3 Allen) 42.

Where the existence of defunct corporations is by statute continued three years for the purpose of bringing and defending suits and winding up its affairs, and a receiver may be appointed upon application of a creditor or stockholder within the three years, a failure to proceed within that period is a good defense to the stockholders, although made personally liable upon insolvency of the corporation: *Von Glahn v. De Rosset*, 81 N. C. 467. And if the corporation is insolvent, though the creditor himself could not sue the stockholders, he could compel the commissioners appointed to take charge of its affairs to proceed against them, and if not done within the statutory time the action is barred: *Stark v. Burke*, 9 La. Ann. 346.

Where bonus stock is issued by a corporation, the time runs from the insolvency thereof, and not from the time of issuance of the stock, for as between the company and the holders of such stock, the issuance thereof was valid, and the creditors are not seeking to enforce a liability acquired through the corporation, but only one ac-

cruing directly to them: *Hospes v. Northwestern Mfg. etc. Co.*, 48 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. 1117.

Where a claim against a corporation becomes barred in three years after its suspension of business, but an action against a stockholder cannot be commenced until after the expiration of one year from such time, in spite of this latter provision, when it becomes barred as to the corporation, it at the same time becomes unenforceable as to the stockholder: *Pacific Elevator Co. v. Whitebeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984, the court saying: "The stockholder standing in the relation of surety to the corporation, his liability must cease when the liability of the corporation no longer exists. Manifestly, and in conformity to well-recognized legal principles, no action can be maintained against a surety unless the liability of the principal exists at the time the action is commenced: See monographic notes to *Lumber Co. v. Haworth*, 98 Iowa, 463, 60 Am. St. Rep. 207, 67 N. W. 383. Conceding, but not deciding, that the statute of limitation did not begin to run against the stockholder until one year after the bank had suspended business, and that thereafter the plaintiff had three years in which to bring its action against the stockholder, it could not recover in such action unless it had a valid and subsisting demand against the corporation, enforceable at law; and this demand it would have to establish before it could recover a judgment against the stockholder. The liability of a stockholder is only such as the statute creates, and under the statute he is only liable for the debts of the corporation which are at the time enforceable against the corporation. The plaintiff in error had no claim that could be enforced against the corporation when it commenced its action against the stockholder; therefore the stockholder is not liable."

2. After Transfer of Shares by Stockholder.—In order that stockholders may not be able to rid themselves of liability for corporate obligations, statutes have very generally been enacted providing that such liability shall continue for a certain fixed time after the transfer of stock, or ceasing to be a stockholder. In such cases, the action must be commenced within the time specified after the transfer, or it is barred: *Hyatt v. Anderson*, 25 Ky. Law Rep. 132, 74 S. W. 1094. Where a statute provides that stockholders of banks shall be liable for six months after transferring their stock, for the debts of the bank, existing at the time of transfer, the ex-stockholder is liable only to the then existing creditors, which liability must be enforced within six months from the transfer: *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875. And where the property of a stockholder is rendered liable to be taken on execution against the corporation for its debts, and it contains in addition the following provision: "And such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof, on the books of the corporation, and for the term of six months after judgment recovered against such corpora-

tion in any suit commenced within the year aforesaid," such limitation applies only to such stockholders whose stock has been transferred and recorded, and not to other stockholders: *Ingalls v. Cole*, 47 Me. 530.

Where a stockholder's liability continues one year after transfer, if such transfer is not made as provided by statute he is still liable: *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 South. 351. The court there said: "Our statute, in the section fixing and defining the liability of stockholders to creditors, after declaring that such liability 'shall continue for one year after the sale or transfer,' proceeds immediately to declare how transfers of the stock may be made, viz., 'by the indorsement and delivery of the stock certificate and the registry of such transfer on the books of the company.'

"How are creditors of the company to inform themselves who are stockholders thereof? The answer, we think, is to be found in the statute, which continues the liability for one year after the sale or transfer, and then proceeds to define how the transfer may be made, viz., by entry thereof on the books of the company. As to creditors, whose rights are in this section the subject of consideration, one, and only one, method of transferring his stock is permitted to the stockholder. Whatever may be the effect of a transfer otherwise made, as between the transferee and transferrer, or between these and the company, nothing else can avail to discharge the liability of the stockholder to creditors than the transfer and the entry thereof on the books of the company and the lapse thereafter of the time named in the statute."

Where, after two years from the time of ceasing to be a stockholder, the action is barred, the dissolution of the corporation has the same effect: *Hollingshead v. Woodward*, 107 N. Y. 96, 13 N. E. 621.

The mere mention of a period of time in connection with the transfer of stock does not mean that such period is intended as a statutory bar. So where the charter of a bank provided that each stockholder should be liable for double the amount of his stock, and for three months after giving notice of transfer, this was held to mean that a stockholder was liable for corporate debts while a member, and also, for such other debts as should be contracted for three months after giving notice of transfer, and did not refer to the time for bringing action: *Fuller v. Ledden*, 87 Ill. 310; *Hull v. Burtis*, 90 Ill. 213. See, also, *Sadler v. Nicholson*, 49 S. C. 7, 26 S. E. 893, in which case it was held that where the charter provided that stockholders should be liable on all debts payable within one year, action was not required to be brought within that time.

The fact that a stockholder ceased to be such before the expiration of the statutory period for bringing suit need not be alleged in a complaint to constitute a good cause of action. If limitation operated to defeat his right, the defendant should set it up in his answer: *Castner v. Duryea*, 44 N. Y. Supp. 708, 16 App. Div. 249.

3. Discovery of Facts Causing Liability.—Where the statute does not run until after the discovery by the aggrieved party of the facts upon which the liability was created, if the means of knowledge existed and the circumstances were such as to put a man of ordinary prudence on inquiry, that is sufficient knowledge to start the statute: *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670, where a creditor could have discovered how the stock stood upon the books of the company by looking at the books, but neglected to do so.

If a liability is imposed on stockholders for any loss or deficiency of the capital stock due to the official mismanagement of the directors, the statute begins to run from the time of loss or deficiency: *Baker v. Atlas Bank*, 50 Mass. (9 Met.) 182.

4. Where Two Different Remedies are Given.—Where there are two remedies leading to the same relief, and the rights accrue at different times, the statute begins to run from the time the right to pursue the earlier remedy accrues: *Parmelee v. Price*, 105 Ill. App. 271, citing *Conklin v. Furman*, 8 Abb. Pr., N. S., 161, of which case it is said, after stating that an action had been commenced against Furman and other stockholders of a corporation, June 24, 1862: "The statute limiting the action to six years was pleaded. The indebtedness in question in the case accrued January 1, 1855, and a suit was commenced against the company and Furman and others, stockholders, June 1, 1855, but was dismissed as to the stockholders, and judgment was recovered against the company, August 9, 1860. The statute of New York, authorized a separate suit against stockholders for the debts of the corporation, but provided that such suit should not be brought until after judgment on the demand against the corporation, and so the separate action was not barred, if it was the only remedy. But, by another statute, suit might be brought against the corporation and any one or more of its stockholders, as soon as the indebtedness of the corporation accrued, and the court held that the statute commenced to run when the debt sued for fell due, viz., January 1, 1855, and that as suit was not brought till June 24, 1862, it was barred by the statute. The judgment was affirmed on appeal: *Conklin v. Furman*, 48 N. Y. 527. A similar decision was rendered in *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519."

5. Stipulation in Insurance Policy as to Time of Suing.—A stipulation in a policy of insurance issued by an insurance company, limiting the time for suing thereon, refers to the time of bringing suit against the corporation on the policy; and a judgment having been obtained against the company in a suit brought within that time, a stockholder cannot defend when sued on his statutory liability on the ground that the suit against him was not brought within the period specified in the policy: *Davis v. Stewart*, 26 Ohio St. 643.

6. Pledge of Stock as Acknowledgment of Debt.—Where, in accordance with the terms of a bank's charter, a stockholder pledges his certificate of stock as security for money furnished him, for

which he gives notes, the stock pledged as a security constitutes a standing acknowledgment of the indebtedness, so as to prevent its becoming prescribed: *Latiolais v. Citizens' Bank*, 33 La. Ann. 1444.

7. Against Estates of Deceased Stockholders.—In *Mills v. Scott*, 99 U. S. 25, it was held that a statute, passed in 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before the 1st of January, 1870, or be forever barred, did not apply to claims against the estate of deceased persons; but that, as formerly, administrators should be allowed one year from the date of their qualification to ascertain the condition of the estates, and for the presenting of claims by creditors, until the expiration of which time no suit to recover a debt of the decedents could be brought.

Where a statute provides that no action for stockholder's liability shall be maintained against the heirs or devisees of such stockholder, unless commenced within one year from the time the claim is allowed or established, such action is not necessarily barred in one year after the corporation goes into insolvency, the commencement of the action not being analogous to "allowing or establishing" the claim: *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788.

c. Power of One Creditor to Suspend the Statute as to All.—The question as to how far one creditor of an insolvent corporation may stop the statute from running as against others, is discussed in *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798, 24 N. E. 259, in the following words: "A suit in the nature of a creditor's bill is the proper proceeding to be adopted by creditors of an insolvent corporation, seeking to enforce the statutory liability of its stockholders: *Umsted v. Buskirk*, 17 Ohio St. 113. And, when such suit is commenced, no creditor can acquire priority, or institute a separate suit for the enforcement of such liability in his own behalf: *Wright v. McCormack*, 17 Ohio St. 86. So that it necessarily follows that the effect of commencing the suit by one creditor is to save the running of the statute of limitations, not only as against the claim of the one filing it, but, also, as against the claim of every creditor of the corporation who comes into the action before its final determination. And this is the general rule. 'A bill filed by one creditor, as plaintiff, in behalf of himself and others, will prevent the statute from running against any of the creditors, who came in under the decree. Every creditor has, after the filing of a bill, an inchoate interest in the suit, to the extent of its being considered as a demand, and to prevent his being shut out, because the plaintiff had not obtained a decree within the six years': *Angell on Limitations*, 6th ed., p. 346, sec. 331. See, also, *Sterndale v. Hankinson*, 1 Sim. 393; *Brinkerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663; *Angell on Limitations*, sec. 167."

In *Hyatt v. Anderson*, 25 Ky. Law Rep. 132, 74 S. W. 1094, however, certain creditors were held barred because they had not filed their claims within the time required after a transfer of stock by a stockholder, although another creditor, who was within the time, asked that he be allowed to sue for the other creditors, but no such order was made within that period. "The liability of the stockholder to each creditor was several. No creditor had any interest in the liability of the stockholder to any other creditor. His only interest in the action was to obtain a personal judgment in favor of himself for his own debt."

d. Effect on Stockholders of Renewals of Indebtedness Made by the Corporation.—Where notes or other written obligations are given in renewal or extension of indebtedness incurred by a corporation, they do not extend the statute of limitations as against the individual stockholders, but the statute runs uninterruptedly from the original obligation: *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85; *Goodall v. Jack*, 127 Cal. 258, 59 Pac. 575; *Jagger Iron Co. v. Walker*, 76 N. Y. 521, overruling *Fisher v. Marvin*, 47 Barb. 159; *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354, affirming 47 Hun, 230; *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686, reversing 34 N. Y. Supp. 1136, 11 Misc. Rep. 729; *Union Bank v. Wando Min. etc. Co.*, 17 S. C. 339. That the time prescribed by the statute of limitations as against the stockholders is not extended by a judgment against the corporation, see *Stilphen v. Ware*, 45 Cal. 110.

In spite of an agreement to extend the time of payment on an obligation against a corporation, while it would not stop the running of the statute as against the stockholders, it is held obiter in *Brigham v. Nathan*, 62 Kan. 243, 62 Pac. 319, that suit may still be brought against them within the statutory period.

e. Conflict of Laws.—The question as to what law should govern in applying statutes of limitations is of the highest importance, as where under the laws of one jurisdiction the right of action would be barred, while under those of another it would still be enforceable. The rule in this connection is that if the statute creating the right also specifies the time for its enforcement, it applies everywhere; but if no special time for limiting the action be mentioned therein, the general statutes of limitations alone governing, they have no extraterritorial force: *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Brunswick etc. Co. v. Nat. Bank*, 88 Fed. 607. As is said in *Schiffer v. Trustees etc.*, 87 Fed. 166: "The liability of the stockholder being contractual and transitory, the limitation of time within which such liability shall be enforced against a person sued thereon is a matter to be determined by the laws of the state in which the action is brought"; and the Kansas statute was held not to control in an action in New York, to enforce the liability of a stockholder in a Kansas corporation.

The time when the stockholder's liability accrues, however, so as to start the statute, depends upon the statute establishing the corporation: *Dexter v. Edmands*, 89 Fed. 467.

f. Constitutionality.—Where a state constitution provides that each stockholder shall be individually liable for his proportion of the debts of the corporation, no limit of time for enforcing this right being prescribed, such provision is not inconsistent with a prior statute limiting the time for suing in such cases, and does not attempt to relieve the stockholder from his constitutional liability: *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 Pac. 85. See, also, *Hunt v. Ward*, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335.

II. Actions Against Subscribers.

a. Nature of Liability of Subscriber for Unpaid Stock.—We now come to a different class of liability from that heretofore discussed, namely, that which arises from unpaid subscriptions on corporate stock. The differences between these two kinds are concisely set forth in *Hauser v. Thompson*, 56 Mo. App. 85, as follows: "The liability of a stockholder in a corporation may be of a twofold character. His obligation to pay in full for his stock either in money or money's worth, is universal, and this is designated as a common-law or subscription liability. The statutes of many states impose an additional liability in favor of creditors, which may be designated as a personal or statutory liability. This classification is recognized in all well-considered decisions bearing on the question. The differences between the two liabilities are radical. Uncalled or unpaid subscriptions are assets of the corporation, and the liability of the stockholder therefor is direct to the corporation and contingent as to the creditors: *Shickle v. Watts*, 94 Mo. 422, 7 S. W. 274; *Sanger v. Upton*, 91 U. S. 56. The statutory or personal liability of a stockholder is direct to the creditor and the corporation has no concern therewith: *Beach on Private Corporations*, sec. 695; *Liberty College v. Watkins*, 70 Mo. 16." See, however, *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 601, 908.

Subscription to the stock of a corporation does not, therefore, create a statutory liability, but arises from the individual contract as specified in the stock subscription, and must be governed by the statute of limitations applying to the latter: *Georgia Mfg. Co. v. Amis*, 53 Ga. 228. And unpaid subscriptions are debts of the stockholders to the company, and not debts of the corporation, and therefore do not fall within the statute of limitations referring to the debts of the corporation: *Chrisman-Sawyer Banking Co. v. Independence etc. Co.*, 168 Mo. 634, 68 S. W. 1026. Stock subscriptions, although to be paid in installments, are not open accounts, so as to be barred by the statute referring to such accounts: *New Orleans etc. R. Co. v. Estlin*, 12 La. Ann. 184.

Where a court of chancery makes a call for unpaid assessments, it has the same effect as if made by the officers of the corporation,

and is simply a contract, and where entered into in another state and the suit is brought in California, it falls under the head of contracts executed without that state and is barred in two years: *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420.

b. When the Right of Action Accrues.

1. Depends on Contract of Subscription.

A. Statute Runs from Call.—When the right of action accrues to recover unpaid subscriptions depends upon the contract of subscription. In *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, the subscribers agreed to pay the amount subscribed by them in such installments as the company might call for, and one per cent at the time of subscription. Thereafter, and before any call was made, the corporation made an assignment for the benefit of creditors. The court held that the statute of limitations did not begin to run in favor of the subscribers from the date of the assignment, but from the time of calling for the unpaid subscriptions, saying: "The promise of the defendant was to pay in such installments as may be called for by the board of directors of the company—which means in such sums and at such times as they might thereafter declare to be necessary. After the first assessment had been made and called in, it could not be known that any further call would ever be made. If the business of the company prospered, no further payments might probably be needed. But if bad management characterized its operations, or disaster beset it for any reason, such a call would be imperatively required. The defendant's contract, therefore, was not to pay absolutely or at all events, but upon a contingency, this contingency to be determined by the directors of the company, who were the mere agents of the stockholders, or, in the event of their neglect or refusal to act, by the decree of a court of chancery.

"The settled rule is, that where money is to be paid, or a thing is to be done, upon the happening of a contingency, or uncertain event, no cause of action accrues, and, therefore, no limitation can run until the contingency happens, or the event takes place."

The following cases are in accord, and the statute does not start to run until a call is made: *Lehman v. Glenn*, 87 Ala. 618, 6 South. 44; *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265; *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 South. 611; *Macon etc. R. Co. v. Vason*, 52 Ga. 326; *Brown v. Union Ins. Co.*, 3 La. Ann. 177; *Glenn v. Williams*, 60 Md. 93; *Washington Sav. Bank v. Butcher's etc. Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644; *Marr v. Bank of West Tennessee*, 72 Tenn. (4 Lea) 578; *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866; *Scovill v. Thayer*, 105 U. S. 143; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. Rep. 867, reversing 28 Fed. 907, and citing *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; *Glenn v. Soule*, 22 Fed. 417; *Glenn v. Foote*, 36 Fed. 824.

The statute does not begin to run from the happening of the contingency justifying a call, but from the call itself: *Consolidated Assn. v. Lord*, 35 La. Ann. 425.

In *Glenn v. Macon*, 32 Fed. 7, a stockholder, in order to prevent waste, petitioned that a receiver be appointed for the corporation. This was done, the order therefor providing that, if any amount was due on the shares of the capital stock, he would proceed to recover the same, and that he might prosecute actions to that end. The court held that this was not such a call as to start the statute running, the order meaning merely that he might bring suit if the court should levy an assessment.

Where a corporation is empowered by statute to collect assessments by the sale of stock and to sue for the balance due, the statute of limitations does not begin to run till the stock is sold and the balance ascertained: *Cape Fear etc. Co. v. Wilcox*, 52 N. C. (7 Jones) 481, 78 Am. Dec. 260; *Cape Fear etc. Co. v. Costen*, 63 N. C. 264. In *Western R. Co. v. Avery*, 64 N. C. 491, where the charter of a corporation provided that if subscribers failed to pay installments as called for, the directors might sell the stock and sue for any deficiency, the statute on each installment was held to run when it became due by a call of the company, the remedy by sale, given by the charter, being merely cumulative.

B. From Insolvency of the Corporation.—There are some decisions to the effect that actions for unpaid subscriptions accrue from the date of insolvency, and not from call: *Franklin Sav. Bank v. Bridges (Pa.)*, 8 Atl. 611; *Glenn v. Dorsheimer*, 23 Fed. 695, 24 Fed. 536. Other cases hold that such actions are enforceable after call, or when the insolvency of the corporation is established, either by a general assignment or a return of nulla bona: *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; or the company must evidently have abandoned its business: *Curry v. Woodward*, 53 Ala. 371. That that statement in the case last-mentioned is merely dictum, see *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92.

That the claim of the trustees and creditors of a dissolved corporation against its stockholders for unpaid stock matures on the dissolution of the company, is held in *Garesché v. Lewis*, 15 Mo. App. 565. So where a statute provides that on the voluntary dissolution of a corporation, if there is any sum remaining due on the stock subscribed, the receiver shall immediately proceed to collect the same, the statute of limitations begins to run upon the dissolution of the company and the appointment of a receiver: *Webber v. Hovey*, 108 Mich. 49, 65 N. W. 619, where the court said: "In the present case there was no assessment to be made by the receiver. The amount of the unpaid subscriptions to the capital stock was fixed and certain. The aid of the court was not necessary in fixing the amount, or to make an assessment or call for the amount unpaid. All that remained to be done was for the receiver to sue for these amounts.

The right of action, then, accrued against the stockholders immediately upon the dissolution of the corporation, and the appointment of the receiver." The court there distinguishes that case from *Scovill v. Thayer*, 105 U. S. 155, which holds that the statute does not run until an authorized demand has been made, in the following words: "But in that case the court was dealing with, and giving construction to, a statute under which the only duty of the assignee was to collect in upon the unpaid stock a sum which, with the other assets of the company, would be sufficient to satisfy the company's creditors, and it was said: 'If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock; for if, in a bankruptcy proceeding, any surplus remained after payment of debts, it would go to the company and not to the stockholders, and we have seen that the company in this case would have no right to any surplus.' In the present case, however, our statute requires the receiver to sue for and collect those unpaid subscriptions, and, if any surplus remains after the payment of the debts, then, by section 26 of the act, the receiver shall distribute it among the stockholders, 'in proportion to the respective amounts paid by them, severally, on their shares of stock.'"

Where the stockholders were made liable for all corporate debts until the stock was paid and the corporation was declared dissolved if the stock was not paid up in two years, the statute begins to run immediately on the termination of the two years: *Phillips v. Therason*, 11 Hun, 141. A creditor with an unsatisfied judgment against the corporation need not wait, however, until the expiration of the two years before bringing an action against its stockholders: *King v. Duncan*, 38 Hun, 461.

C. From Time of Payment Due.—In an action to enforce the liability of a stockholder of a dissolved corporation for unpaid stock, the statute begins to run from the maturity of the debt and not the dissolution of the corporation: *McGinnis v. Kortkamp*, 24 Mo. App. 378, citing *McGinnis v. Barnes*, 23 Mo. App. 413.

Where the subscription is payable at a fixed time, the right accrues then, and the statute begins to run: *Baltimore etc. Co. v. Barnes*, 6 Har. & J. (Md.) 57; so where by the by-laws the stock is made payable monthly, no call is necessary, but the right accrues and the statute runs from the time each installment is payable: *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 691, 908.

D. Where Contract is Silent as to When the Subscription is Due.—Where the subscription is silent as to the time of payment, there being nothing in it limiting payment to a call or other contingency, it becomes payable immediately, the statute running from then on: *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 South. 611. See, also, *Williams v. Meyer*, 41 Hun, 545. In *Pittsburgh etc. R. Co. v. Plummer*, 37 Pa. St. 413, a party subscribed for a number of shares of

stock in a company, but retained it in his own hands for a number of years. When sued on his subscription, it was held that the statute of limitations did not begin to run until the delivery of the subscription book to the company, as there was no contract till then.

2. Notes "on Demand" Given for Subscriptions.—The fact that notes, payable on demand, are given for stock subscriptions, does not mean that the statute will commence to run from the date thereof. An interesting case in that connection is *Kilbreath v. Gaylord*, 34 Ohio St. 305, where it is said: "The plaintiffs in error and their associates became incorporated for the purpose of carrying on the business of life insurance. The only means of the company for doing business consisted of its stock subscriptions. In payment, or to secure the payment of these subscriptions, the subscribers executed their non-negotiable notes to the company, payable on demand. These notes must be construed in connection with the nature of the business of the corporation, and in view of the object intended by the parties giving the notes. The notes represent the fund intended ultimately for the payment of debts, if they should be required for such purpose. To hold that the statute of limitations began to run from the time of the execution of the notes would defeat the purpose intended, and work a fraud, not only on the policy holders, but on such of the stockholders as might see fit to pay the cash in discharge of their liability. . . .

"The notes were intended to be payable on the call of the directors. We see no good reason why such intention should not have effect. The statute of limitation is no more available as a defense against the collection of the notes than it would have been against the collection of the subscriptions." See, to the same effect, *Crofoot v. Thatcher*, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171.

3. Effect of Fraud.—Where a statute requires that a certain per cent of the subscriptions be paid up, and the treasurer of the corporation made affidavit to that effect, the fact that a creditor, to whom the corporation incurred an indebtedness, was told by the treasurer that that amount had not been paid in, was held not such a discovery of fraud as to start the statute of limitations running in favor of the subscribers: *Albright v. Texas etc. Co.*, 8 N. Mex. 110, 42 Pac. 73.

In *Thompson v. German Ins. Co.*, 77 Fed. 258, a receiver of an insolvent corporation sued to collect an assessment on stock of a member thereof, who was alleged to have made a fraudulent transfer of his shares. The court held that the statute ran from the time of the assessment's becoming due, and not the discovery of the fraud, such not being the basis of the action, but merely to enforce a statutory liability.

4. Unreasonable Length of Time in Making Calls Barring Right of Action.—There is still another line of cases holding that though the contract of subscription is payable as the directors may order,

still if no call be made for more than ten years, it will be considered barred, and no action to enforce it be maintained: *Great Western Tel. Co. v. Purdy*, 83 Iowa, 430, 50 N. W. 45. And in *Pittsburgh etc. Co. v. Graham*, 36 Pa. St. 77, where the subscriptions were made on condition that the construction of the road be prosecuted, a failure to make a call within six years constituted a bar, and the company was bound to perform that condition within that time: See, however, *Allibone v. Hager*, 46 Pa. St. 48, where no call was made in eleven years and it was held not barred.

c. How far Judgment and Execution Against the Corporation are Necessary.—In *Lester v. Bemis Lumber Co. (Ark.)*, 74 S. W. 518, a creditor sued to recover from a stockholder the unpaid amount due on his written subscription. It was held that the creditor could not maintain the action until he had shown that he had first exhausted his remedy against the corporation; that the statute of limitations began to run as soon as execution had been issued against the corporation and returned unsatisfied, or if none was issued, whenever the creditor had notice that the corporation was insolvent; and notice to him of this fact would be presumed as soon as the company's insolvency became a matter of general notoriety: See, also, *Kelly v. Clark*, 21 Mont. 291, 69 Am. St. Rep. 668, 53 Pac. 959; *King v. Pony Gold Min. Co. (Mont.)*, 72 Pac. 309.

In *Handy v. Draper*, 23 Hun, 256, under a New York statute, the time begins to run from the bringing of an action against the corporation, and not from the return of execution against it. And in *First Nat. Bank v. Greene*, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754, a judgment against the corporation is held to be no part of the creditor's right of action, but evidentiary, only, to establish it.

Under a Missouri statute, a creditor need not wait till a call has been made, but he may have execution issued against a stockholder where there is a judgment against the corporation and a return of *nulla bona*; and in such case the statute does not commence to run until such judgment and unsatisfied execution: *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133, 17 S. W. 644.

Where judgment against a corporation was rendered on a note given for a debt before it was barred, a stockholder who is sued for a balance due on his subscribed stock cannot plead that part of the indebtedness on which the judgment was rendered is barred because accrued more than five years before the commencement of the action against him: *Tama Water-Power Co. v. Hopkins*, 79 Iowa, 653, 44 N. W. 797.

d. Suspension of the Statute by Unauthorized Act of Officer.—It has been held that the operation of the statute of limitations may be suspended as against the stockholders even by an unauthorized act of its officers. So where the president of a corporation, who had virtually been its sole manager for a number of years, upon its suspension, issued scrip to its creditors, payable in three years, no one

objecting thereto, the stockholders were held liable for their unpaid subscriptions for three additional years: *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

e. Right of Creditor to Sue Where the Corporation is Itself Barred.

The question has arisen whether, if the corporation would be barred from maintaining an action against a subscriber, a creditor would be necessarily barred. The answer to this must depend upon what the liability of a subscriber is considered. If a creditor is only subrogated to the rights and remedies of the corporation, it stands to reason that his right to sue is limited by the right of the corporation itself so to do, and if barred as to the latter it is barred as to the former: *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 691, 908; *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. (S. C.) 227.

In *McGinnis v. Barnes*, 23 Mo. App. 413, we have the opposite view, where the creditor was allowed to sue a subscriber although the corporation itself would be barred, the court saying: "It is not now questioned anywhere that the capital stock of a corporation is a trust fund for the benefit of the corporation's creditors. When any part of the stock remains unpaid for in a stockholder's hands, he is the trustee, holding for the objects of the trust so much of the fund. When a person subscribes for stock and leaves the whole or a part unpaid, he takes upon himself, to that extent, a trusteeship which brings him in privity with the creditors, present or future, of the corporation, until all their claims are satisfied, or until he has discharged his obligation for the stock unpaid. Hence, we are bound to consider the statute of limitations as it affects the relations between the stockholder and the creditor, and not as it affects the relations between the stockholder and the corporation."

III. Against Officers.

a. Failure to Perform Statutory Duties.

1. **Liability Considered Penal.**—One of the common duties of corporate officers, imposed upon them by statute, is that of publishing periodic reports as to the condition of the company, a failure to observe which renders them liable for all the debts of the corporation incurred during that period. A similar liability is also often imposed on them for declaring dividends when the corporation was in fact insolvent; or until the entire capital stock should be paid up. In action by creditors to enforce such liability, it becomes necessary to determine whether it is the nature of a penalty or what else may be its character, for the purpose of deciding how long a time may elapse before the right of action is barred.

There are many well-considered cases on this subject, and are about evenly divided. The following authorities are to the effect that such liability is a penal one, and governed by the appropriate statute of limitations: *Gregory v. German Bank*, 3 Colo. 332, 25 Am.

Rep. 760; *Merchants' Nat. Bank v. Northwestern Mfg. Co.*, 48 Minn. 349, 51 N. W. 117; *State Sav. Bank v. Johnson*, 18 Mont. 440, 56 Am. St. Rep. 591, 45 Pac. 662; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275; *Patterson v. Thompson*, 86 Fed. 85; *Davis v. Mills*, 113 Fed. 678; *Patterson v. Wade*, 115 Fed. 770.

In *Merchants' Bank v. Bliss*, 35 N. Y. 412, affirming 24 N. Y. Super. Ct. (1 Rob.) 391, speaking of a statute of this character, the court said: "Under these sections, the trustees are declared to be jointly and severally liable for all the debts of the company in case of a violation of their provisions. The liability, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation; but upon failure to file the report, or upon making a prohibited dividend, however small or trifling the amount, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted, in the one case before the report shall be made, and in the other while they shall respectively continue in office. These provisions appear to be severally punitive, inflicted on grounds of public policy, for the protection of creditors, and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. . . . Nor, indeed, is it necessary that the creditor should have sustained any injury or damage by reason of a violation of these sections. It is sufficient that the party prosecuting the action should be a creditor when the violation of the law takes place."

In *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006, a statute requiring the capital stock to be paid in within a certain time, the directors to be liable for all debts if it should become insolvent, was held penal; but the section requiring a correct report to be filed, the directors to be liable for all damage resulting from a failure to comply therewith, is not so, but remedial, being founded on fraud and deceit; and is governed by the statute of limitations applying to actions for relief against fraud.

An act making the trustees and corporators of an insurance company liable for its debts till the whole amount of capital stock should be paid in, to the amount subscribed by each, is penal: *Gridley v. Barnes*, 103 Ill. 211; *Kimball v. Hurlbut*, 12 Ill. App. 500; *Junker v. Kuhnen*, 18 Ill. App. 478.

2. Opposite View.—The other line of cases holds that the liability created in such cases is not penal: *Hargroves v. Chambers*, 30 Ga. 580; *Howell v. Roberts*, 29 Neb. 483, 45 N. W. 923; *Coy v. Jones*, 30 Neb. 798, 47 N. W. 208. So in *Neal v. Moultrie*, 12 Ga. 104, the liability of the directors for the excess of debts over a certain

amount is not penal, but in the nature of a specialty: See, also, *Banks v. Darden*, 18 Ga. 318. So where the president and secretary are made liable for the debts of the company for failure to file a certain certificate, a statutory liability is created, and is governed by the statute of limitations applying to actions founded on contract or liability, express or implied not in writing: *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952. Where failure to publish the annual report makes the officers answerable for all damages resulting, it is one to recover damages for fraud: *St. John v. Stafford*, 26 Ind. App. 695, 59 N. E. 1075, citing *American etc. Indemnity Co. v. Ellis*, 156 Ind. 212, 59 N. E. 679. A cause of action given against bank officers under a statute to recover deposits received while the bank was in failing condition is upon a statutory liability, and not a penalty: *Frame v. Ashley*, 59 Kan. 477, 53 Pac. 474, reversing 45 Pac. 927.

In *Wolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, reversing 30 Ill. App. 70, the court had before it a statute declaring the directors liable for the excess if the debts exceeded the capital stock. This was held no penalty, the court citing with approval the following quotation from *Morawetz on Corporations*, volume 2, section 908: "It is not always quite clear what the courts mean to express by saying that statutes of this character are penal, and that they impose upon the directors a penal liability. The liability of directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the courts mean to express. The liability of directors to creditors for a tort, or a misapplication of corporate funds, or a breach of trust, does not arise out of contract; yet the courts would certainly not call this a penal liability, or refuse to enforce it because it arose under the laws of a foreign state. Nor is the liability of the directors under these statutes penal, in the sense in which the word 'penal' is used in criminal law. It is not a penalty or fine imposed by the state for the infraction of public law. The liability of the directors is, both in form and substance, a private obligation, similar, in many respects, to that of sureties. It is imposed by the legislature partly for the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by those who have control over the company's funds. The statutes imposing this liability establish a new rule of private right—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency."

In *Knoop v. Blaffer*, 39 La. Ann. 23, 6 South. 9, an action against directors for having furnished false statements of the affairs of a bank was, under the statute, *ex delicto*; but where they were made liable for allowing the bank to make loans while insolvent, it was held *quasi ex delicto*.

Action against officers for accounting for neglect and mismanagement are not penalties, but equitable actions, and governed accordingly by the statute of limitations: *Pierson v. Morgan*, 20 Abb. N. C. 428, affirmed in 4 N. Y. Supp. 898, 17 Civ. Proc. Rep. 124; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663.

3. When the Right of Action Accrues.—Where the officers of a corporation are made liable for its debts, the right of action accrues to the creditor at the time the indebtedness is incurred; *Swan v. Burnham*, 70 N. H. 580, 49 Atl. 93; *Bassett v. St. Albans Hotel Co.* 47 Vt. 313; or the maturity of the debt: *Patterson v. Wade*, 115 Fed. 770; *Continental Nat. Bank v. Buford*, 114 Fed. 290, affirming 107 Fed. 188. Where the directors of a bank are sued for fraud or mismanagement, the cause of action accrues from the date of the acts complained of, and not only after the expiration of its charter: *Percy v. White*, 7 Rob. (La.) 513.

In *Duckworth v. Roach*, 81 N. Y. 49, affirming 8 Daly, 159, it was held to be immaterial when the debt arose if it existed and might be the subject of an action at the time default was made in complying with the provisions of the statute. Where there are two alternatives given as to the payment of taxes, at different times, a cause of action does not accrue until a breach of the second alternative, and the statute does not commence to run till then: *Rector etc. of Trinity Church v. Vanderbilt*, 98 N. Y. 170. Where a trustee became liable for a debt of the corporation by reason of failure to file a report, the statute then commenced to run, and a right of action thereon was barred after three years: *Blake v. Clausen*, 16 Misc. Rep. 400, 38 N. Y. Supp. 514, 25 Civ. Proc. Rep. 310.

Where the directors are made liable if, within sixty days from the first of each year, they fail to make a report, for all debts contracted during the year preceding the time when such report should be filed, if it is not made when a debt is contracted, the report then being due, the liability attaches as soon as it is contracted, and the statute then commences to run: *Colorado etc. Fuel Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834. But where the indebtedness is incurred before the default began, no cause of action accrues until after the expiration of the time within which the report may be filed, the statute not commencing to run till then: *Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809.

Where directors pass an illegal resolution authorizing the payment of money, the statute runs from the date of the resolution, and not from the time of payment of the money; and the fact that a creditor had no knowledge of the transaction, there being no fraudulent concealment by the directors, does not stop the running of the statute: *Link v. McLeod*, 194 Pa. St. 566, 45 Atl. 340. The fact that a party holds the notes of a bank, the directors of which, by exceeding their powers, caused its failure, does not give him an unlimited time in which to sue; for although an action on a bank note is not controlled by limitation, such an action as is here brought is one

founded on malfeasance or negligence, and the statute runs against it: *Hinsdale v. Larned*, 16 Mass. 65.

A statute making the trustees of certain corporations liable for all debts payable within a year, provided suit to collect them be begun within one year after they become due requires that such suit be brought against the trustees, and does not apply to the corporation: *Hull v. Sigel*, 7 Lans. 206, 13 Abb. Pr., N. S., 178.

Where stockholders sue directors for an accounting for dividends and profits, arising from the construction of a railroad, if the bill does not show when the road was completed or when the right to a final accounting commenced, it is not demurrable as being barred by limitation, the completion of a railroad not being such a matter of public history as to be taken judicial notice of: *Hazard v. Dillon*, 34 Fed. 485.

4. Judgment Against the Corporation, and Renewal of Indebtedness Suspending the Statute.—A right of action against officers of a corporation having accrued, unless the running of the statute is suspended, it will become barred after the period of limitation. Charges made annually by the treasurer of a corporation against himself in the books of the company for annual interest, are sufficient recognition of a debt to take it out of the operation of the statute if brought down to a period within the statutory time for suing: *Bluehill Academy v. Ellis*, 32 Me. 260. A judgment against the corporation, however, does not stay the running of the statute, nor a promise of the managing director: *Swan v. Burnham*, 70 N. H. 580, 49 Atl. 93; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313; nor will an extension of time of payment or payment on account by the corporation have that effect: *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275; *Patterson v. Thompson*, 86 Fed. 85. That a renewal of the debt by the corporation does not bind the directors, see, also, *Blake v. Clausen*, 158 N. Y. 727, 53 N. E. 1123, affirming 41 N. Y. Supp. 772, 10 App. Div. 223. The renewal of a note does not release the officer from his statutory liability to pay, or immediate action therefor, the liability of the officer and the corporation being entirely independent: *Continental Nat. Bank v. Buford*, 114 Fed. 290, affirming 107 Fed. 188.

In *Sullivan v. Sullivan Mfg. Co.*, 20 S. C. 79, several pre-existing notes were consolidated into one large note, the question then being was this a renewal of the former indebtedness or not. The court there said: "The consolidation of the previous notes into the large note had one of two effects: First, it created a new debt upon the corporation, of which the previous notes were the consideration, which notes it paid off and extinguished; or, secondly, it was a mere renewal of the previous notes which, for convenience, were consolidated into one and not a new debt creating a new liability. If it had the first effect, then we do not see why the directors, who were then in office, should not be liable for this large note under section 29, if at

any time they failed or refused to comply with sections 16, 17, and 28. The liability of the directors does not depend upon the character or consideration of the debt of the company, but upon the fact of that indebtedness accompanied with a failure on their part to perform certain imposed duties at or about the time the said indebtedness was contracted by the company, and in this event the currency of the statute would commence at the maturity of said large note. Under such a view, the ruling of his honor, the circuit judge, would be error. If, however, the second effect was the result, and the previous notes were not, in fact, paid off and extinguished, then the liability of the directors would depend upon the application of the statute to their agreement as to said notes, and the ruling of his honor would be correct.

"The pivot, then, in this branch of the case is, Did this consolidation effect a payment and extinguishment of the previous debts, or was it a mere renewal, leaving those debts unpaid and still in existence?"

The court affirmed the judgment of the circuit court, holding that the earlier notes were not paid off.

5. Effect of Successive Defaults.—The courts are agreed in holding that successive defaults on the part of officers do not serve to extend their liability; but the cause of action is barred after the statutory lapse of time from the first default after the accruing of the indebtedness: *Colorado Fuel etc. Co. v. Lenhart*, 6 Colo. App. 551, 41 Pac. 834; citing *Larsen v. James*, 1 Colo. App. 313, 29 Pac. 183; *State Sav. Bank v. Johnson*, 18 Mont. 440, 56 Am. St. Rep. 591, 45 Pac. 662; *Losee v. Bullard*, 54 How. Pr. 319; *Chapman v. Comstock*, 58 Hun, 325, 11 N. Y. Supp. 920; *Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275.

Nimmons v. Tappan, 32 N. Y. Super. Ct. (2 Sweeney) 652, announces a different rule, and holds that in case of successive defaults, the action lies if brought within the statutory time from the last one. That decision has, however, been overruled: *Cornell v. Roach*, 9 Abb. New Cas. 275.

When a new director comes into the board, a new default makes him liable for the debts then existing—that is, he becomes jointly liable with the members of the new defaulting board; and an action may be prosecuted against the old and new directors if brought before the liability of either is statute barred: *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26, affirming 49 N. Y. Supp. 1049, 25 App. Div. 547.

b. Officers of a Corporation as Trustees.

1. View Holding Them Such.—In the principal case, *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, the question arose as to how far officers of corporations are trustees, so as to be barred from pleading the statute of limitations. In this connection there are two views, directly opposed to each other.

The first holds that directors are such trustees, and as long as that relation exists, until such trust has been repudiated, the statute of limitations cannot apply: *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Albert v. State*, 65 Ind. 413; *Payne v. Bullard*, 23 Miss. (1 Cush.) 88, 55 Am. Dec. 74; *Crofoot v. Thatcher*, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171. So the assets of a national bank in the hands of a receiver constitute a trust fund for creditors, and the statute does not run against valid claims: *Riddle v. First Nat. Bank*, 27 Fed. 503. Where the officer died, the statute did not run in favor of his heir until the latter evinced an intention to claim the property as his own, thus repudiating the trust: *Southern Mut. Ins. Co. v. Pike*, 32 La. Ann. 483.

Where the president of a corporation, acting as manager, lulls the directors into a feeling of security by misstatements, he is a trustee in the sense that when sued for an accounting he cannot plead the statute of limitations: *Coxe v. Huntsville Gaslight Co.*, 106 Ala. 373, 17 South. 626. In *Williams v. Reilly*, 41 N. J. Eq. 137, 3 Atl. 692, the treasurer of a savings bank, who at the same time was one of its managers, was held a trustee who could not avail himself of the statute when sued for dereliction and malfeasance in office. And the managers of a savings bank stand in the relation of trustees to depositors: *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775. The court there distinguished *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, by saying: "The only pertinent point decided in that case is that the statute of limitations began to run in favor of a director as soon as he vacated his office, but in so deciding the court was careful to say that the case before it was one between the stockholders and directors, and not one between the latter class of officers and creditors or depositors."

Where the officers enter into a conspiracy of which a stockholder knows nothing, the statute cannot be pleaded in an action to recover for misappropriation due to the conspiracy until notice or knowledge of the facts are brought home to him: *Joy v. Fort Worth etc. Co.*, 24 Tex. Civ. App. 94, 58 S. W. 173. And in *Bent v. Priest*, 86 Mo. 475, it was held that where, under a contract entered into by a director with an outside party for his influence, he received property, it was received as trustee, and the statute ran only from the time of knowledge of the agreement and acquisition of the property: See, also, *European etc. R. Co. v. Poor*, 59 Me. 277.

In *Rice v. Pacific R. R.*, 55 Mo. 146, a subscriber of stock paid money due upon calls to an agent of the company, who died without transmitting it. Several years after the stock was declared forfeited by reason of the nonpayment of the above sum, and the subscriber applied for a mandamus to compel the issuance of the certificate of stock. The company pleaded the statute of limitations, but the court held that it did not run in favor of the defendant, until the stock was declared forfeited, when the trust was repudiated, as previous to that

time the plaintiff's position as stockholder had never been denied. That the statute of limitations does not apply to subscription, as being a trust fund, see *Appeal of Mack* (Pa.), 7 Atl. 481.

Where it is alleged that a director purchased the trust property, a railroad, thus creating a breach of trust, the prayer being that such property be held for the benefit of the corporation, and be declared to be held in trust for it, such is not an action for the recovery of real estate, or one based upon fraud, but is a suit to enforce an implied trust, the cause of action accruing when the director repudiated the claim of the corporation and asserted title in himself: *Covington etc. R. Co. v. Bowler*, 72 Ky. (9 Bush) 468.

2. Opposite View.—The other view is to the effect that officers of a corporation are not such express and direct trustees as to be precluded from setting up the statute of limitations. The rule is expressed in *Baxter v. Moses*, 77 Me. 465, 52 Am. Rep. 783, 1 Atl. 350, as follows: "Constructive trusts, and all trusts, save purely equitable or express trusts, are in equity subject to the statute of limitations: *Wood on Limitations*, sec. 58, and cases in note. It is there said: 'With respect to the operation of the statute of limitations upon cases of trusts in equity, the distinction is, if the trust be constituted by act of the parties, the possession of the trustee is the possession of the cestui que trust, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud, or the like, his possession is adverse, and the statute of limitations will run from the time that the circumstances of the fraud were discovered'"; and the court held that directors of a corporation fell within the latter class, and so might avail themselves of the statute. See in accord the following: *Landis v. Saxton*, 105 Mo. 486, 24 Am. St. Rep. 406, 16 S. W. 912; *Kane v. Bloodgood*, 7 Johns Ch. 90; *Pierson v. McCurdy*, 33 Hun, 520, affirmed in 100 N. Y. 608, 2 N. E. 615; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448, citing *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286, and *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; *Cullen v. Coal Creek etc. Co.* (Tenn.), 42 S. W. 693; *Boyd v. Mutual Fire Assn.* (principal case), 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171.

In *Newson v. Commissioners etc.*, 103 Ind. 536, 3 N. E. 163, it was held that the receipt of money by public officers did not constitute them such trustees as to prevent them from pleading the statute.

In *Somerset County Bank v. Veghte*, 42 N. J. Eq. 39, 6 Atl. 278, the directors of a bank sued its cashier for the embezzlement of funds. He was allowed to plead the bar of the statute, the court saying: "The alleged fraud was in the embezzlement by the defendant, while acting as cashier of the complainants, of their money intrusted to his hands. The claim against him arising therefrom is one cognizable at law. If so, the statute applies to it in equity. The complainant's counsel insist that in the case of *Williams v. Reilly*,

41 N. J. Eq. 137, 3 Atl. 692, it was held that one who was sued in this court for dereliction and malfeasance in an office similar to that held by the defendant, could not avail himself of the statute of limitations. In that case, the suit was indeed against the defendant for dereliction and malfeasance in the office of treasurer of a savings bank, and it was held that the statute of limitations was not a defense to the bill; but it was so adjudged on the ground that he was a member of the board of managers of the bank, and the object of the bill was to charge him, in the interest of the depositors, with dereliction of duty as a manager holding an office of special trust (the office of treasurer) in the management."

The receiver of an insolvent national bank may sue its shareholders to recover dividends paid out of the capital of the bank, there being no profits; but the statute runs in their favor, it being an implied or resulting trust, and not an express one: *Hayden v. Thompson*, 71 Fed. 60, 17 C. C. A. 592, 36 U. S. App. 361.

MUELLER v. NORTMANN.

[116 Wis. 468, 93 N. W. 538.]

OPTIONS—Right to Withdraw from.—If an option to purchase real property is given for a good consideration, it cannot be withdrawn before the time specified for its continuance. (p. 998.)

OPTIONS—Death Does not Terminate.—If an option to purchase real property is given for a specified time on a good consideration, the death of the giver before the expiration of the time does not impair the right of the other party to thereafter make his election and do the other things necessary on his part, and thereupon to enforce performance against the heirs and representatives of the giver. (p. 998.)

Action to enforce specific performance. On December 3, 1901, F. J. Klein, in consideration of twenty-five dollars, gave to plaintiff an option to purchase real property, evidenced by an instrument in writing containing the following clause: "In case J. F. Mueller elects to purchase said land under this option, he is to pay at the office of Theo. Mueller, in Milwaukee, Wis., within four weeks from date hereof, forty-nine hundred and seventy-five dollars, when a warranty deed of said land shall be delivered conveying said land free and clear of all encumbrances, and a complete abstract of title shall be furnished."

Six days later Klein died. On December 31st of the same year, plaintiff elected to purchase the land, and, going to the office of Theodore Mueller, tendered the requisite sum, which

was refused on the ground that Klein was dead. Afterward an administrator was appointed and qualified, and the present suit was begun against him and the heirs of Klein. Judgment in the trial court for the plaintiff, and the defendants appealed.

Markham & Hamilton and Fred C. Ellis, for the appellants.

Nath, Pereles & Sons and G. D. Goff, for the respondent.

470 BARDEEN, J. It is wholly unnecessary in this case to discuss the law of so-called "option contracts." Both parties substantially agree that a mere option does not ripen into a contract, and become a binding obligation upon the grantor, unless accepted by the holder within the time limited therein, and according to its terms (*Cheney v. Cook*, 7 Wis. 413; *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110), and that rights under such an option expire on the date limited, without notice or declaration of forfeiture: *Cummings v. Town of Lake Realty Co.*, 86 Wis. 382, 57 N. W. 43; *Nelson v. Stephens*, 107 Wis. 136-145, 82 N. W. 163. While the option may be but an offer to sell, yet if the seller, for a good consideration, agrees that he will not withdraw his offer until a specified time, he is bound: *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687, and cases cited. In the case at bar the seller agreed, upon a valuable consideration, that the offer should remain open for four weeks. Within that period the plaintiff did everything that the written option required him to do. He went to the office designated, and tendered the sum specified, as his election to complete his option. That tender was to the very person designated in the option, at whose office the money was to be paid. The payment of the money at the place stated was the only condition imposed upon the purchaser. But the appellants argue that the death of Mr. Klein revoked the authority of any one at Mr. Mueller's office to accept the money, on the ground that death revokes all agencies. If the contract was one the intestate could not have revoked in his lifetime, then his heirs or legal representatives have no greater right: *Raesser v. National Ex. Bank*, 112 Wis. 591, 88 Am. St. Rep. 979, 88 N. W. 618. His death did not revoke the right of the buyer to make his election within the time limited. The tender at the place designated was all that the option required of him. When he asked the court to enforce the contract, he made his tender good by offering to pay, and the relief granted him was on condition that he pay the amount agreed. The

appellants ⁴⁷¹ argue that plaintiff should have had a special administrator appointed, to whom tender and notice could have been given. Even admitting this would have been proper, have they suffered or lost anything by such failure? Have their rights been prejudiced in any degree by reason thereof? Certainly not. The suggestion that it would be a great hardship for the parties interested in the estate "to hunt throughout Christendom to learn that the option had not been accepted by the grantee" is worthy of but slight consideration. An inquiry at the office where the money was to have been paid would have saved the "hunt throughout Christendom," and relieved the parties of their imaginary woes. Our conclusion is that the so-called option was one which Klein could not have withdrawn in his lifetime, and that its terms remained open to plaintiff's election up to the expiration of the date mentioned therein. The plaintiff's tender of the money at the office of Theodore Mueller was a sufficient election of his intention to purchase, and that no valid objection is shown by the record why the contract should not be specifically enforced.

The judgment appears to have properly preserved the rights of the appellants, and should therefore be affirmed.

By the Court. So ordered.

An Option given by the owner of land for a valuable consideration, whether adequate or not, agreeing to sell it to another at a fixed price if accepted within a specified time, is binding upon the owner and all his successors in interest with knowledge thereof. The offer contained in the option cannot be withdrawn within the time designated therein: *Ross v. Parks*, 93 Ala. 153, 30 Am. St. Rep. 47, 8 South. 368. See, in this connection, *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; *Gustin v. Union School Dist.*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 47 Atl. 114. But it has been held that an option to purchase does not descend to the heirs or personal representatives of the person having the privilege, but that upon his death the person giving the option is released from his obligation: *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476.

REYNOLDS v. NIELSON.

[116 Wis. 483, 93 N. W. 455.]

VESSELS—Jurisdiction of State Courts Over.—A vessel is personal property, and the rights of its owners are proper subjects for consideration in the state courts in cases where the jurisdiction of the national courts in the exercise of their admiralty and maritime powers is not exclusive. When a subject is within the admiralty and maritime jurisdiction, such jurisdiction is not necessarily exclusive. (pp. 1000, 1001.)

VESSELS—Jurisdiction to Partition.—State courts of equity have jurisdiction to entertain a suit by a part owner of a vessel to partition it by directing the sale and the division of the proceeds. (p. 1002.)

Action to partition a vessel used upon the waters of Lake Michigan and registered under the navigation laws of the United States, the plaintiff being the owner of one-third and the defendant two-thirds. The trial court denied relief at the instance of the defendant, on the ground that the matter was governed by the maritime laws of the United States and was not within the jurisdiction of the state courts. The plaintiff appealed.

J. E. Wildish, for the appellant.

M. C. Krause, for the respondent.

485 MARSHALL, J. The judgment is wrong and must be reversed. A vessel is personal property and the rights of the owners therein are proper subjects for consideration in the state courts in cases where the jurisdiction of the federal court in the exercise of its admiralty and maritime powers is not exclusive. When a subject is within admiralty and maritime jurisdiction, such jurisdiction is not necessarily exclusive, as is plainly indicated by the federal law: U. S. Rev. Stats., sec. 563. It provides that district courts have exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. From that it will be seen that, to justify the decision here, the case must be a civil cause of admiralty and maritime jurisdiction, and it must be one for which there is no remedy in the state courts. The fact is that it is neither. This court has several times held that, in cases within maritime and admiralty jurisdiction, the state court has jurisdiction concurrent with that of the federal

courts in administering the remedies afforded by its laws: *Horn v. Schooner Trial*, 22 Wis. 529; *Thorsen v. Schooner J. B. Martin*, 26 Wis. 488, 7 Am. Rep. 91; *Warehouse & Builders' Supply Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57, 71 N. W. 804.

There is no need here to define the precise limits of the term "civil causes of admiralty and maritime jurisdiction." Suffice it to say that it does not include any where the primary object in view is to obtain a partition of vessel property, nor any where partition between common owners of a vessel can be enforced, there being a majority ownership as in this case. As regards mere control of a vessel by maritime law, the majority interest is supreme, subject to such restraints by the ⁴⁸⁶ federal court as may be necessary to protect the minority owner in his rights to have the vessel employed reasonably, to have it preserved, and to enjoy his share of the net earnings: *Story on Partnership*, secs. 437-439; *The Seneca*, 18 Am. Jur. 486, Fed. Cas. No. 12,670; *The Orleans v. Phoebus*, 11 Pet. 183; *Andrews v. Betts*, 8 Hun, 322.

Counsel for respondent seem to suppose, and we apprehend the trial court was guided by the same idea, that since the federal court, in the exercise of admiralty and maritime jurisdiction, cannot under any circumstances properly compel the sale of a vessel and a division of the proceeds where there is a majority owner, the state court cannot, overlooking, it seems that such circumstance suggests jurisdiction in such cases by the state court instead of want of jurisdiction. If the federal court has jurisdiction of a matter pertaining to a vessel, subject to the navigation laws of the United States, because the same is within the scope of its admiralty and maritime powers, inquiry must be made as to whether such jurisdiction is exclusive before the matter is deemed to be outside the jurisdiction of the state court. If there is no federal jurisdiction, obviously, that fact alone does not militate against there being state jurisdiction. A vessel is personal property. A judicial sale thereof and division of its equivalent in money, where partition cannot otherwise be had, and there is good ground in equity for one of two or more common owners to seek such relief, is a proper subject for the exercise of equity jurisdiction by the rules of the common law. In fact, only a court of equity, by the common law, can deal with such matters. Its jurisdiction in that regard is very ancient and is founded solely on want of any remedy at law: *Knapp on Partition*, 492; *Freeman on*

Cotenancy and Partition, sec. 426; *Conover v. Earl*, 26 Iowa, 167; *Fobes v. Shattuck*, 22 Barb. 568; *Swain v. Knapp*, 32 Minn. 431, 21 N. W. 414. Under the chancery rule mere desire of a part owner of personal property to terminate the common ownership is not sufficient to put judicial machinery ⁴⁸⁷ in motion. That has been changed here by statute: Stats. 1898, secs. 2327a-2327c. Now, any person owning personal property in common with another or others may at his election have a partition thereof in specie where that can reasonably be effected, or in the equivalent in the form of money where that is necessary because division in no other way can be accomplished at all or without injury to the interests of the parties. All of the provisions of law relating to complaints in actions for the partition of real estate, so far as applicable, are made to include partition of personal property: Stats. 1898, sec. 2327a.

It would seem from what has been said that on principle the circuit court had jurisdiction of the subject of this action. But few similar cases are reported in the books. That may be because seldom has the power of the state court in such matters been questioned. *Andrews v. Betts*, 8 Hun, 322, is directly in point. It was there held that proceedings for the partition of personal property can be had in equity and nowhere else, and that vessels are no exception to that rule. That case is recognized by text-writers as laying down the law correctly: *Knapp on Partition*, 491. The text there is as follows: "The court of equity has jurisdiction over an action, brought to secure a partition of personal property between tenants in common thereof. It matters not whether such property is a vessel to be used upon the high sea, or other personal property, so long as there is a cotenancy and a failure to agree upon the part of the cotenants, a court of equity has jurisdiction over the partition of the property, or a sale thereof and a division of the proceeds. Such court is competent to give relief in such cases by making the decree in partition, as the circumstances of the case or facts may warrant, or decree a sale, where the partition of such property cannot be had."

We indorse that. It is a mere statement of the common law. It is re-enforced by our statutes above cited. The circuit court, on the facts of this case, should have granted the ⁴⁸⁸ prayer of the complaint that the property be sold and the proceeds divided according to the interests of the parties, and should have, by the decree, directed some appropriate method of making such granted relief effective.

By the Court. The judgment of the circuit court is reversed and the cause remanded for judgment in accordance with this opinion.

A *State Court* may order the sale of a vessel at the instance of a part owner desirous of ending the joint ownership therein: *State v. Judge Watts*, 7 La. 440, 26 Am. Dec. 507. On part owners of vessels in general, see the monographic note to *Smith-Green Co. v. Bird*, 90 Am. St. Rep. 355-410. And on the exclusiveness of the jurisdiction of admiralty courts in matters affecting vessels, see *Knapp, Stout & Co. v. McCaffrey*, 178 Ill. 107, 69 Am. St. Rep. 291, 52 N. E. 898; *Gindele v. Corrigan*, 129 Ill. 582, 16 Am. St. Rep. 292, 22 N. E. 516.

TWEEDDALE v. TWEEDDALE.

[116 Wis. 517, 93 N. W. 440.]

CONSIDERATION—Agreement to Pay a Sum to a Third Person.—An agreement by one person to pay his debt to another by paying it to a third person does not require that there be any consideration for the promise between the immediate promisee and the third person. (p. 1005.)

GIFT to a Third Person—When Enforceable.—An agreement between a creditor and his debtor that the debtor will pay the debt to a third person is enforceable by the latter, though it was in the nature of a gift to him. The exchange of promises between the creditor and the debtor is sufficient to bind the latter to such third person. (p. 1005.)

CONTRACTS—Promise to Pay Money to a Third Person.—Where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties establishing the essential privity between the promisor and the third person requisite to binding contractual relations between them resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction, and the liability is as binding between the promisor and the third person as it would be if the consideration of the promise moved from the latter to the former and such promisor made the promise directly to the third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence. The liability, being once created by the acts of the immediate parties to the transaction, neither one, nor both of them, can thereafter change the situation as regards the third person without his consent. (p. 1009.)

MORTGAGE Securing Debt Due to a Third Person—Satisfaction of, When Void.—If a mortgage shows on its face that it in part secures an obligation due to a third person, the satisfaction of such mortgage by the mortgagee without the payment of such obligation is void. The record of the mortgage is sufficient to bring home to all persons the interest of such third person. (p. 1010.)

Suit to foreclose a mortgage. Mary Tweeddale, in October, 1896, conveyed certain lands to her son, Daniel Tweeddale, the defendant in the present suit, taking from him a bond for her support. He and she subsequently united in conveying the same land to one Perry. It was then encumbered by a mortgage. Perry afterward conveyed to the defendant and received from him a mortgage, which mortgage, among other things, stipulated that in case defendant at any time sold any part of the land twelve hundred dollars should at once become due from him to his mother, fifty dollars should become due to his sister, Margaret Merverden, and one hundred dollars to his brother, Edward Tweeddale. The defendant sold the land to John Paul, at the time of the sale settling and paying the claim of Mary Tweeddale, and she thereupon satisfied the mortgage of record. She had no authority, however, to satisfy the mortgage as to the interest of Edward Tweeddale thereunder, and he therefore commenced this action of foreclosure. Neither he nor his sister knew at any time prior to the discharge of the mortgage of the provisions it made for their benefit. The trial court denied the plaintiff any relief, on the ground that the provisions of the mortgage were mere incomplete gifts which the mortgagee, Mrs. Tweeddale, had recalled by satisfying the mortgage. The plaintiff appealed.

John Wattawa and Nash & Nash, for the appellant.

M. T. Parker and George W. Wing, for the respondents.

520 MARSHALL, J. The agreement by Daniel Tweeddale to pay plaintiff one hundred dollars and his sister fifty dollars, as part of the consideration for the property which came to him from his mother, stands upon the same footing as any promise made by one person to another, for a consideration, for the benefit of a third person. As soon as the title to the land was vested in Daniel Tweeddale and the bond and mortgage were delivered to his mother, he became obligated to pay to them that part of the consideration for the land represented by the sums secured to his brother and sister, if the principle controls that a grantor of land becomes obligated to pay the whole or a part of the consideration for the property conveyed to him to a stranger to the transaction if it is left in his hands for **521** that purpose, and upon his promise to make such payment. We apprehend the trial court so viewed the matter. Notwithstanding the finding that the sum secured to appellant and that secured to his sister were mere gifts, the turning point

in the case, in the mind of the circuit judge, we apprehend, was that the beneficiaries did not know of the agreement and did not accept the same or in any way become parties thereto till their mother, with the consent of Daniel Tweeddale, rescinded the transaction. An agreement by one person, upon a good consideration, to pay his debt to another by paying the same to a third person, is just as binding where there is no consideration for the promise between the immediate promisee and the third person as where there is such consideration. Whether the benefit secured to the third person is a gift, strictly so called, or one intended, when realized, to discharge some liability of such promise to the third person does not change the situation. It is the exchange of promises between the immediate parties, and the operation of law thereon, that binds the promisor to the third person. The idea which ruled this case—that where a person for a consideration paid to him by another agrees to pay a sum of money to a third person, a stranger to the transaction, the latter does not thereby become possessed of the absolute right to the benefit of the promise, nor until he accepts the same in some way; and that while he is ignorant of the promise, or thereafter, at any time before he assents to the transaction, it may be rescinded—we must admit is well supported in the books. The authorities so holding, in the main, go upon the ground that privity between parties is absolutely essential to a liability of one to another of a contractual nature, and that until the third person brings himself into privity with the one who has promised to be his debtor by at least assenting thereto, he has at least no legal right to the benefit of the promise; and that, till then, the parties to the transaction may rescind it or change it ⁵²² as they see fit. There is also much authority to the effect that, while the element of privity between the promisor and the third person is essential to render the promise absolutely binding upon the former, no act of the latter is necessary thereto; that the law, operating upon the acts of the parties to the transaction, creates the privity immediately upon its being consummated between them, and that neither one nor both of them can thereafter, without the third person's consent, enforce the promise. The first class of authorities is well represented by the following: *Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Crowell v. Hospital*, 27 N. J. Eq. 650; *Durham v. Bischof*, 47 Ind. 211; *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *White v. Hunt*, 64 N. C. 496. The second class of authorities

is fairly well represented by the following: *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Hare v. Murphy*, 45 Neb. 809, 64 N. W. 211; *Graves v. Macfarland*, 58 Neb. 802, 79 N. W. 707; *Brewer v. Dyer*, 7 Cush. 337; *Mallett v. Page*, 8 Ind. 364; *Henderson v. McDonald*, 84 Ind. 149; *Pruitt v. Pruitt*, 91 Ind. 595; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Frank v. New York etc. R. Co.*, 7 N. Y. St. Rep. 814; *Esling v. Zantzinger*, 13 Pa. St. 50.

It is useless to endeavor to review the authorities touching the subject before us with a view of harmonizing them upon any one single theory as to the principle upon which the liability to the third person is based, or as to what are the essential elements to effect it. There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned. As indicated there are authorities to the effect that there is no absolute liability to the third person till in some way he is brought into privity with the promisor. Others are to the effect that such privity is entirely unnecessary. Others, as we have indicated, hold that while the element of privity is necessary, ⁵²³ the law creates it, no act of the third party being necessary thereto. There are others to the effect that there is no liability in law without the element of privity between the promisor and the third person, hence, if he has a right to enforce the promise the remedy is in equity unless he can show that he adopted the promise made for his benefit so as to become a party thereto. There are many other phases of the question that find support in the books. The liability is sustained in some cases under the doctrine of novation, and held not to exist in the absence of any of the elements necessary to satisfy the law on that subject. In other cases it is held that there is no principle of subrogation or novation involved in the liability; that it rests solely upon and is fixed absolutely by the transaction between the person making the promise and receiving the consideration and the person to whom the promise is made and from whom the consideration moves. There is confusion not only between different courts, but confusion in the decisions in many jurisdictions in the same court. The supreme court of Illinois, in *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 239, speaking on the subject, correctly described the situation in the following language: "The courts are not harmonious—not even the courts in the same states—and it may be added that the cases are not capable of being reconciled.

. . . . On the mere authority of adjudged cases in other tribunals, we would have to vacillate to keep in line."

The extent to which the first class of cases we have mentioned goes in one direction is indicated by the following from the syllabus of *Trimble v. Strother*, 25 Ohio St. 378: "In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defense to show that before the plaintiff assented to or acted on the promise made in his favor, the agreement had been rescinded."

The sharp conflict between the two principal classes of cases is well indicated by reading in connection with that ⁵²⁴ quotation the following from the syllabus of *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209: "A purchaser of mortgaged premises from the mortgagor, who assumes payment of the mortgage debt, or who accepts a conveyance reciting his assumption of the same with a knowledge of such recital, will at once become personally liable to the mortgagee for the mortgage indebtedness; and he cannot defeat the mortgagee's right to hold him responsible, by procuring a release from the mortgagor."

It is believed that this court is committed to that doctrine, though it must be admitted that there are expressions in several opinions that may well be taken as indicating either a contrary view or that it is uncertain just what the rule here is on the subject. To illustrate, in *Putney v. Farnham*, 27 Wis. 187, 9 Am. Rep. 459, we find this language: "After notice, therefore, to them [the third persons], and their assent, the liability of the defendant was absolutely fixed. . . . It was no longer in the power of Corlett [the immediate promisee] to forbid payment or to withdraw his assent, or to require payment to be made to himself, without the consent of Fallon and Gallagher."

There is impliedly a decision that, till the third person receives notice of the agreement made for his benefit, and assents to it, the immediate parties to the transaction may rescind it, or the immediate promisee may himself change the direction of the benefit. In *Bassett v. Hughes*, 43 Wis. 319, the expression in *Putney v. Farnham*, 27 Wis. 187, 9 Am. Rep. 459, was repeated. In *Enos v. Sanger*, 96 Wis. 150, 65 Am. St. Rep. 38, 70 N. W. 1069, language was used, taken by itself, indicating that privity between the third person and his promisor does not exist prior to his adoption in some way of the promise. But after discussing authorities in this and other states bearing on the subject, the law as stated in *Brewer v. Dyer*, 7 Cush.

337, and *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, was approved as more fully stating the established doctrine here than any language used in our own decisions. For the purpose of clearing up any uncertainty existing here ⁵²⁵ the following, substantially, as a judicial rule, was deduced from our decisions and the authorities which met with our approval: "Where a grantee in a conveyance assumes and agrees to pay the debt of a third person to his creditor, neither such person nor such creditor being connected contractually with the grantor, as part of the consideration for his purchase, there is no necessity for any consideration to pass from such third person or his creditor to such grantee to support such agreement. A portion of the consideration for the purchase being left in such grantee's hands, appropriated by the grantor to the payment of the debt which such grantee agrees to pay in consideration of the conveyance and of such appropriation, he cannot be heard to object to the performance of his contract because his grantor was not liable for such debt. When the grantor makes such an appropriation, and the grantee, for a sufficient consideration, promises to pay the amount so appropriated to the creditor of such third person, such grantee thereby becomes liable to such creditor; and such liability rests solely on such consideration and such promise."

That is in harmony with the language used on the subject in *Bishop v. Douglass*, 25 Wis. 696, and *Palmeter v. Carey*, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586. In *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774, it was said that out of the transaction of one person promising, for a consideration paid to him by another, to pay a sum of money to a third person, the promisor becomes a debtor of such third person the same as if the promise were made directly to him, as liability is determined by his undertaking with his immediate promisee. In *Etscheid v. Baker*, 112 Wis. 129, 88 N. W. 52, the last case here where the subject is discussed, *Bassett v. Hughes* is cited and some significance given to the fact that the person for whose benefit the promise was made knew of and assented to it before any attempt was made to revoke it. However, *Enos v. Sanger*, 96 Wis. 150, 65 Am. St. Rep. 38, 70 N. W. 1069, was cited, and there was no intention to disturb the rule there laid down and re-enforced in ⁵²⁶ *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774. Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person

a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent. It is plainly illogical to hold that immediately upon the completion of the transaction between the immediate parties thereto, the law operates upon their acts and creates the element of privity between the promisor and the third person, and at the same time to hold that such third person's status as regards the promise may be changed thereafter without his consent. The idea that privity between the promisor and the third person is necessary to render the transaction between the original parties thereto beyond the reach of either of them to revoke it, or both acting together to rescind it, springs from the supposed necessity of contractual relations between the promisor and the third person, binding upon the promisor at law. The moment such essential is established, it seems clear that such third person's right accrues and becomes absolute.

527 True, the doctrine that the element of privity may be established without the knowledge or assent of the third person, other than that constructive assent arising from the operation of law upon the acts of the parties, is inconsistent with the rule prevailing here as to all but married women, that a mere beneficiary of a policy of life insurance has no vested rights therein; but so is the doctrine that mere assent by a third person to a promise made for his benefit will render it irrevocable, inconsistent therewith. Neither the assent of a mere beneficiary in a policy of life insurance, to the promise made for his benefit, nor such assent coupled with an independent promise by the insurance company to him to abide thereby, has any effect upon the power of the assured to control the policy by

changing the beneficiary or disposing of the insurance fund by will. The doctrine here in that regard was established at an early day. It is contrary to the rule which prevails generally. It is adhered to under the rule of *stare decisis*, and the doctrine that rules of property established by judicial decisions long adhered to should not be disturbed even if a different decision would be rendered if the court were permitted to treat the subject from an original standpoint. The rule as to insurance contracts has not been applied by this court to any other class of contracts. The court is not disposed to treat it as a principle of general application or extend it beyond the special class of contracts to which it has been applied.

In view of what has been said we must hold that, upon the sale of the land to Paul, Daniel Tweeddale became absolutely indebted to plaintiff upon the bond and mortgage mentioned in the complaint for the sum of one hundred dollars; that the satisfaction of the mortgage by Mary Tweeddale is void as regards such debt; that his interest in the bond and mortgage was sufficiently brought home to Daniel Tweeddale's grantee, Paul, by the record of the mortgage, to preclude him from being an ⁵²⁸ innocent party to the void satisfaction and successfully invoking the registry laws for protection.

By the Court. The judgment is reversed and the cause remanded, with directions to render judgment in favor of plaintiff in accordance with this opinion.

Contracts for the Benefit of a Third Person are given an extended consideration in the monographic note to *Baxter v. Camp*, 71 Am. St. Rep. 176-207.

HILL v. SIDIE.

[116 Wis. 602, 93 N. W. 446.]

VENDOR AND VENDEE—Stipulation that the Latter shall Hold as Tenant at Sufferance.—An agreement in a contract for the sale and purchase of land that in case of default in payments, the vendee shall hold the premises as tenant at sufferance of the vendor, does not change the relation of the parties to that of landlord and tenant after such default, nor otherwise forfeit the rights of the vendee. (p. 1012.)

Action to recover the value of the use and occupation of certain lands which the plaintiff, in July, 1893, agreed to sell to the defendant. The contract of sale and purchase provided, among other things, that the vendee should hold the premises as tenant at sufferance of the vendor, subject to be removed as a tenant holding over by process under the statute in such case made and provided, whenever default should be made in the payment of any of the installments of the purchase money. The complaint showed that the vendee, at the time the contract was made, was in possession of the land as the tenant of the vendor; that he continued to occupy it until the fall of the year 1900, but made no payments either of principal or interest on the contract after January 1, 1895. A general demurrer interposed to the plaintiff's complaint was overruled, and the defendant appealed.

Doherty & Baldwin, for the appellant.

H. P. Proctor, for the respondent.

604 WINSLOW, J. The sole question in this case is as to the legal effect of that clause in the land contract which provides that in case of default in payments the vendee shall hold the premises as "tenant of sufferance" of the vendor. The plaintiff claims that this clause operates to change the relation of the parties, so far as possession of the land is concerned, into that of landlord and tenant, and relies upon *Wright v. Roberts*, 22 Wis. 161. The defendant, on the other hand, claims that the principle stated in *Wright v. Roberts* has been completely overruled by the later case of *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678. There is certainly a direct conflict in principle between the two cases. *Wright v. Roberts* was a case where the exact point in the case at bar was presented, and it was held,

under a precisely similar contract, that upon default an action for use and occupation could be maintained, because by the clause in question the parties had created the relation of landlord and tenant, with all the remedies which were incident to that relation. On the other hand, it is held in *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678, where, under a similar contract, the vendor upon default brought an action in equity to foreclose the contract, that the objection that the vendor had an adequate remedy at law, by proceeding against the vendee as a tenant at sufferance, could not be maintained, because the vendee "had rights and equities under his contract of purchase which would defeat an action at law against him as a mere tenant at sufferance; and such an action would not lie ⁶⁰⁵ in such a case where the appellant is in possession as purchaser, having paid part of the purchase money." In both of the cases cited, as in the case at bar, the vendee was in possession under the contract of sale. The first case goes upon the principle that the clause in question is effective to change the relationship of the parties, so far as possession of the real estate is concerned, to the relationship of landlord and tenant, and the other upon the principle that it does not change such relationship so long as the vendee has any equity under his contract. There is no way of reconciling the two cases, and the difficulty is increased, rather than diminished, by the fact that the former case is not referred to in the later case, although it was cited in the briefs and relied upon as authority. Another fact is of some significance, namely, the fact that *Wright v. Roberts*, 22 Wis. 161, has not been affirmed or even cited in any subsequent opinion in this court. It certainly is important that the rule in such cases be definitely and certainly settled. It is not so important how it be settled, as it is that there should be no doubt about it. It is in the full sense a rule of property, and should not be subject to changes. Viewed in this light, it seems that the rule as laid down in *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678, should be followed. It has stood upon the books for nearly twenty-three years as the last authoritative utterance of this court upon the question. It must be presumed that it has been regarded as stating the position of this court, and also that contracts which have been made since that time have been made with reference to it. It has support in the general and familiar doctrine that the law does not favor forfeitures of valuable rights, and will endeavor to avoid them. It finds support, also, in the following cases: *Chicago etc. Ry.*

Co. v. Skupa, 16 Neb. 341, 20 N. W. 393; Ellsworth v. McDowell, 44 Neb. 707, 62 N. W. 1082.

By the Court. Order reversed and action remanded, with directions to sustain the demurrer.

A *Vendor* may maintain ejectment against his vendee who has made default in the payments stipulated for in the contract of sale, which are conditions precedent to the execution of a conveyance: *Browning v. Estes*, 3 Tex. 462, 49 Am. Dec. 760; *Seabury v. Stewart*, 22 Ala. 207, 58 Am. Dec. 254; *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942. As to the necessity of notice to quit before bringing the action, see *Fears v. Merrill*, 9 Ark. 559, 50 Am. Dec. 226; *Glascock v. Robards*, 14 Mo. 350, 55 Am. Dec. 108. Where time is declared to be of the essence of the contract, it is said that a vendee who fails to make his payments as agreed loses all rights in the property and in the moneys already paid by him, unless there are equitable considerations entitling him to relief: *Glock v. Howard etc. Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 55 Pac. 713.

RUEPING v. CHICAGO AND NORTHWESTERN RY. CO.

[116 Wis. 625, 93 N. W. 843.]

MASTER AND SERVANT—Negligence—What Questions may be Considered in Actions for.—In an action to recover of a railway corporation for injuries conceded to have been suffered by the plaintiff from the negligence of defendant's employes, not authorized or ratified by it, the only questions for consideration by the jury are what is the nature of the plaintiff's injuries and what sum of money will compensate him for his loss. (p. 1015.)

MASTER AND SERVANT—Punitive or Exemplary Damages for Unauthorized Acts or Neglects of Servants.—A master is not liable for punitive or exemplary damages for injuries wrongfully inflicted by his servants upon another without proof that he directed the wrongful act to be done or subsequently ratified it, and in the absence of such authorization or ratification, the degree of negligence, as to whether ordinary or gross, has no proper place in the controversy as a measure of the plaintiff's right to redress, and should not be submitted to the jury. (p. 1016.)

NEGLIGENCE.—The Measure of Damages in an Action Against a Master for the Negligence of His Servant is the same whether the negligence is ordinary or gross. (p. 1017.)

NEGLIGENCE—Evidence to Show that Negligence was Gross, When Inadmissible and Prejudicial.—Evidence of gross negligence where there can be no punitive damages as a matter of law or damages for mental suffering caused otherwise than by physical injury is irrelevant, and is liable to be prejudicial where, in the very nature of things, it is patent that there was no mental suffering induced by insult to be compensated for. (p. 1017.)

EVIDENCE of Gross Negligence—Admission of—When Prejudicial.—The admission of evidence of gross negligence on the part

of defendant's servants may be prejudicial and entitle it to a new trial, though the jury finds that such gross negligence did not exist, if counsel for the plaintiff persistently contends before the jury that the defendant was guilty of criminal negligence, and that mere compensation to the plaintiff for his loss would be inadequate to the enormity of the defendant's fault, and the jury is appealed to to fix punitive damages, having regard to the ability of the defendant to respond, and the verdict is for a sum so large as to indicate that the jury must have regarded the case as one in which more than compensatory damages might be awarded. (pp. 1021, 1022.)

JURY TRIAL—Verdict—When Excessive.—Where the evidence shows that the plaintiff's leg was broken by an accident admitted to have resulted from the negligence of the defendant's servants, that plaintiff was forty-five years of age, that he will never entirely recover from the effect of his injury, that he remains able to carry on his business substantially as before, a verdict for twelve thousand dollars is excessive, and may be set aside by the appellate court. (p. 1023.)

JURY TRIAL—Right of the Appellate Court to Name a Sum Which the Plaintiff may Accept.—Where there is no contention that the defendant is not liable to respond in compensatory damages, but the appellate court finds that the sum awarded by the jury was excessive, it may properly, upon reversing the judgment, name a sum which the plaintiff may accept and terminate the litigation if he sees fit. (p. 1025.)

Action to recover for personal injuries suffered by the plaintiff while a passenger on defendant's excursion train. The answer admitted the injury of the plaintiff by the ordinary negligence of the defendant, but denied that it or its servants were guilty of any greater degree of fault than mere failure to exercise ordinary care. It put in issue the extent of the injury as to the amount of the damages. The complaint did not allege that the defendant authorized or ratified the conduct of its servants. Counsel for plaintiff, in his opening address to the jury, claimed that the subject of gross negligence was the all-important one to be dealt with, and proceeded in a manner calculated to inflame the minds of the jury and prejudice them against the defendant on account of its guilt in operating the trains in reckless disregard of human life; that the difference between the contention of plaintiff and of the defendant respected the degree of fault, whether it was merely guilty of ordinary or of gross negligence. Counsel for the defendant, on the other hand, claimed before the jury that there was no question of gross negligence in the case, and that the only question for consideration was the amount that should be awarded as compensatory damages.

At the trial, plaintiff was permitted, against the objection of defendant, to introduce evidence at great length upon the subject of defendant's negligence, and particularly with a view

to establish that its servants were guilty of gross negligence. The rulings of the trial court were such as to permit plaintiff's counsel to pursue the course indicated and to allow him to place before the jury evidence to sustain his claim that defendant's servants were guilty of gross negligence. The jury returned a special verdict finding for the defendant as to the question of gross negligence, but assessing the plaintiff's damages at twelve thousand dollars. Judgment having been entered on the verdict, the defendant appealed.

Edward M. Hyzer, for the appellant.

Edward S. Bragg, for the respondent.

629 MARSHALL, J. This case from first to last was tried upon a wrong theory. Counsel for appellant was clearly right in his position that upon the pleadings the only questions for decision by the jury were these: 1. Are the plaintiff's injuries permanent? 2. What sum of money will compensate him for his loss? Those questions, with proper explanations to enable the jury to understand their scope and the legal principles governing the same, would have covered all the matters required to be solved to settle the controversy between the parties. It may be that the learned counsel for plaintiff really supposed that his client was entitled upon correct legal principles to show all the circumstances of the accident. It may be that he did not consciously lead the learned circuit judge astray by his attitude, suggesting expressly or by implication that under the pleadings respondent was entitled not only to show gross negligence on the part of defendant's servants, as bearing on the question of compensatory damages, but for the purpose of charging appellant with punitive damages, notwithstanding there was no claim in the complaint or in the evidence that defendant authorized the acts complained of or ratified them. However, it would be a reflection upon the distinguished counsel for respondent, which **630** we hardly feel justified in suggesting, to treat this case as if he was misinformed in respect to the fact that the settled judicial policy of this state is to the contrary, and has been for some over forty years. While if the duty devolved upon us now to demonstrate the correctness of such policy, tested by principle and authority, it would not seem to be a specially difficult task, we shall not enter into any discussion thereof, since the matter has been settled by a long line of adjudications of this court. In Milwaukee etc. Ry. Co.

v. Finney, 10 Wis. 388, decided in 1860, it was held that though a person is liable for compensatory damages for injuries wrongfully inflicted by his servants upon another while in the performance of their duties as such servants, the principal cannot "be visited with damages by way of punishment without proof that he directed the wrongful act to be done or subsequently affirmed it; that without such authorization or ratification the degree of negligence, as to whether ordinary or gross, has no proper place in the controversy as to the measure of the plaintiff's right to redress and should not be submitted to the jury." The same principle, so far as applicable, ruled *Bass v. Chicago etc. Ry. Co.*, 36 Wis. 450, 17 Am. Rep. 495; S. C., 42 Wis. 654, 24 Am. Rep. 437; *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760; *Patry v. Chicago etc. Ry. Co.*, 77 Wis. 218, 46 N. W. 56; *Mace v. Reed*, 89 Wis. 440, 62 N. W. 186; *Robinson v. Superior R. T. R. Co.*, 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897; *Bryan v. Adler*, 97 Wis. 124, 65 Am. St. Rep. 99, 72 N. W. 368; *Gaertner v. Bues*, 109 Wis. 165, 85 N. W. 388. In all the later decisions of the court such principle was deemed so firmly established that a mere reference to the previous adjudications was all that was deemed necessary in applying the same. In *Robinson v. Superior R. T. R. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, 68 N. W. 961, this language was used: "This court has repeatedly held, in effect, that exemplary damages can only be recovered against the principal for the ⁶³¹ wrongful and malicious act of the agent, when such act is either authorized or ratified by the principal."

In *Gaertner v. Bues*, 109 Wis. 165, 85 N. W. 388, this language was used: "There is no finding that such acts were authorized or ratified by the defendant. Without this, there can be no recovery as and for punitive damages. Such damages are given only by the way of punishing the malice or oppression, and are usually graduated by the intent of the party committing the wrong. When the action is against the principal for the act of an agent, the question of their assessment cannot properly be submitted to the jury unless there is evidence connecting the principal with such intent on the part of the agent."

Counsel occupied considerable space in his brief in arguing that a principal is responsible for the negligence of his agent in the pursuit of his duties resulting in an injury to another, and therefore that, necessarily, on principle and authority, all

the circumstances attending the act may properly be shown in an action to recover for the wrong, whether the proper measure of damages be such as will merely compensate such other for his actual loss or the jury be permitted in their discretion to allow an additional sum by way of punitive damages. True, a principal is responsible for gross negligence under the circumstances stated. That is supported by all the cases cited. But not responsible for more than compensatory damages without the element of authorization or ratification by him. The measure of damages is the same without such element, whether the degree of fault be ordinary or gross negligence. So, in such case, the circumstances of the injury are entirely immaterial where actionable negligence is admitted, unless they are of such special nature as to present, as one of the elements to be compensated for, sense of wrong or insult arising from an act apparently dictated by a spirit of willful injustice or a deliberate intent to vex or degrade. It is held that mental suffering of that character is a proper subject for compensatory damages (*Grace v. Dempsey*, 75 ⁶³² Wis. 313, 323, 43 N. W. 1127; *Duffies v. Duffies*, 76 Wis. 374, 386, 20 Am. St. Rep. 79, 45 N. W. 522); that all mental suffering, coupled with physical injury—that form which springs merely from insult or willful wrongdoing as well as that caused by physical pain—is in a proper case a legitimate subject to be considered in awarding compensatory damages. The cases holding generally that the circumstances attending the infliction of an injury in an action to recover compensation therefor are material regardless of whether liability is admitted, are not universally restrained by the language of the opinion within their legitimate limits. It seems that it needs only to be suggested that evidence of gross negligence, where there can be no punitive damages as matter of law, or damages for mental suffering caused otherwise than by physical injury, is irrelevant; that it is liable to be prejudicial where, in the very nature of things, it is plain that there was no mental suffering induced by insult to be compensated for. Counsel calls our attention to the opinion of Mr. Justice Davis in *Milwaukee etc. Ry. Co. v. Arms*, 91 U. S. 489, where this language is found: "As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled

with the idea, that compensation alone is the true measure of redress."

An examination of the entire opinion will show that the materiality of intention which the court was talking about was in respect to whether the defendant was liable for punitive or only compensatory damages. As an abstract proposition it seems too elementary to warrant any very extended discussion, that as regards any element of compensable injury except mental suffering caused by insult or something of that sort, the intent of the wrongdoer neither enhances nor ⁶³³ mitigates the loss. There was no attempt here to recover for any such element. The circumstances of the case show that no such element entered into it. Therefore, there was clearly no justification for presenting the subject of gross negligence to the jury for consideration.

We cannot in justice to the learned circuit judge who presided at the trial and the distinguished counsel for respondent, omit to notice *Lawson v. Chicago etc. Ry. Co.*, 64 Wis. 447, 54 Am. Rep. 634, 24 N. W. 618, to which counsel refers us. The opinion there, taken as it reads, justifies the conduct of the trial. However, it seems that no such effect should be given to the case. There was no claim in the complaint there of liability for gross negligence. The essential allegation to support such a claim was wanting. There was no proof offered or received, so far as we can discover in the report of the case or the printed matter used upon the argument, suggesting gross negligence. There was no element of injury of a compensable character that would not have existed regardless of whether the fault of the defendant was ordinary or gross negligence. Yet, the trial court, misconceiving what constitutes gross negligence—not understanding that it requires actual intent to injure, or that disregard of human life or of consequences evincing a willingness to produce harmful results, sometimes called intent in law and equivalent to intent in fact (*Ryan v. La Crosse City R. Co.*, 108 Wis. 122, 83 N. W. 770; *Milwaukee etc. Ry. Co. v. Arms*, 91 U. S. 489)—directed the jury to convict the defendant of such fault because, as was said, the evidence established it, and the measure of damages was no greater than would have resulted from ordinary negligence, the degree of fault admitted in the answer. The error was not harmful, because there was nothing in the case upon which the court predicated his decision tending by reason of the ruling to enhance the recovery, and the jury were distinctly restrained,

in assessing the damages, to such compensation as would fairly remunerate the beneficiary ⁶³⁴ of the cause of action for her pecuniary loss. This language was used in deciding the case: "The respondent was allowed to show the circumstances of the collision against the objection of the appellant, in order to show that the servants of the company were guilty of gross negligence. According to the brief of the learned counsel of the appellant, 'it made no difference in the case so long as defendant was negligent. If plaintiff showed herself otherwise entitled to recover, she could only be defeated by showing negligence on her husband's part.' This being so, proof of gross negligence was immaterial and could do no harm. But we think proof of the accident and its circumstances was proper, and that it justified the finding of gross negligence. The negligence of the company was charged in the complaint and admitted in the answer, but its degree was an open question for the jury."

Since, as the court said, in effect, whether the wrong of the defendant was characterized by the essentials of gross negligence was immaterial to the case, and ordinary negligence was charged and admitted, rendering defendant liable for full compensatory damages to the beneficiary of the cause of action, and there was no other element of compensable loss involved than such as was of a distinctly pecuniary character, we must confess that the court was wrong in saying that the degree of the defendant's fault was a proper subject for proof and for consideration by the jury. It seems that the furthest the court should have gone was to have said that, the liability of the defendant for the pecuniary loss suffered by the widow of the deceased being admitted and the jury having been limited in the assessment of damages to such elements, evidence respecting the circumstances of the injury was unnecessary, and, as regards mere degree of negligence, was error, but harmless error.

We will say in passing that we do not lose sight of the language called to our attention in *Bass v. Chicago etc. Ry. Co.*, 36 Wis. 462, 17 Am. Rep. 495, to the effect that the mere inadvertent placing of a railway train in charge of negligent or careless ⁶³⁵ agents, or that any negligence by the agents of a railway company in charge of its trains, "may well deserve the epithet of gross." In view of the long line of decisions in this state regarding the essentials of gross negligence, it would hardly seem that such language, quoted, as it was, from an-

other jurisdiction, and used merely *arguendo*, should be referred to as authority.

Counsel for respondent insists that if it was error to admit evidence of gross negligence of defendant's servants and to try the case on the theory that defendant might be guilty of that degree of fault it was not prejudicial error, because the finding on that was in its favor, citing *Stone v. Chicago etc. Ry. Co.*, 88 Wis. 98, 59 N. W. 457. That would be true if there were no indications in the record that defendant was prejudicially affected notwithstanding. A universal rule cannot be predicated on *Stone v. Chicago etc. Ry. Co.*, 88 Wis. 98, 59 N. W. 457, and similar cases. The question of whether error of the sort in question is harmful or not must necessarily be determined very largely by the facts of each particular case.

The persistence with which counsel for respondent, from his opening address to the jury till the case was finally submitted to them, contended that appellant was guilty of criminal negligence and that mere compensation to plaintiff for his loss would not be inadequate to the enormity of its fault, and the extent to which rulings were made in harmony therewith, could hardly have resulted otherwise than to unfit the jury to fairly consider and decide the vital issues in the cause. Such conduct of the trial went to an extraordinary length. A few excerpts from the record will amply show that. Speaking of the responsible officers of the defendant, who were entirely innocent of any criminal fault or moral turpitude, or personal fault at all, this language was used by the learned counsel: "If Puck were to publish a cartoon of these distinguished gentlemen in procession on that Sunday as they came from church—I have no doubt they were all at church—Wall street ⁶³⁶ was not running that day—he would picture this long line of mourners and grievous characters with tears dropping down from their eyes, and put under it what they sometimes do to give point to the caricatures, 'We wonder what this will cost.' Then it will be left for anybody else to determine what they meant when they said, 'We wonder what this will cost,' and whether it was the tears that were shed for what it might cost, or whether the tears were shed because they had got caught once when it was apparent that they would be held responsible."

The great wealth of the defendant and the amount of money damages requisite to be visited upon it in order that it might feel the smart of the legal lash and be conscious of the enormity of its offense, was treated in part thus: "These impositions by

way of fine for example's sake, punishment's sake, to operate as a warning to protect the body politic that travel to and fro, in this case over railroads—the same rule that applies outside of railroads applies here—correspond the punishment that you impose with the ability to pay the money that you impose and then you have an easy, graded movement—as easy as you ever can have—in fixing either compensatory or exemplary damages. . . . Now, as a public example, in the way of punishment, how much more, how many more thousand in addition shall you give, so that when the blister is administered, it will draw. That is what we want for example's sake and for punishment's sake.”

Note the appeal to the jury to fix compensatory damages, having regard to the ability of the defendant to respond. What justification can there be suggested for conduct so calculated as that to inflame and pervert the minds of an ordinary jury assembled to perform so simple a duty as that of determining the money damages necessary to compensate for loss suffered; or for the use in addressing the jury of language like this respecting the circumstances of the accident: “As I said to you, some were launched into the other world; others had legs broken or ribs broken; every ailment, very nearly that could be inflicted upon them came upon them. They spent their summer in pain and misery; and became ⁶³⁷ thence, some of them, as I think I shall show you, . . . crippled for life.” Or this language in respect to the engineer who handled the train: “Ran in upon that engine, crashed there in its force and rebounded, one car telescoping into another, sending, as we have shown, five or six unshrived souls to their Maker and left a large number, whatever that number may be, crippled for life.” Pages might be covered in presenting a full history of the trial with expressions of the same sort, tending to unfit any ordinary jury for doing justice in the case.

It is with much regret that we are, in the discharge of our duties, required, as above, to give even a few glimpses of the unhandsome features of the trial of this case. It is to be regretted that counsel so distinguished should have so indulged his personal mastery of a situation as to lead so conscientious a judge as the one who presided upon this trial so far astray. It is to be regretted that counsel will do that under any circumstances. Counsel should never forget that they are of the instruments provided by law for the administration of justice—officers, as it were, in the eye of the law charged with a high degree of

responsibility respecting the protection of the rights of their clients within the legitimate boundaries of the controversy they are called upon to present for adjudication, and charged as well with a high degree of responsibility not to purposely or negligently go outside such boundaries. Within that sphere they may, with all their learning, ability and industry, present their client's claim; but they will step outside thereof at the peril of sacrificing the very interests they are in duty bound to safeguard.

From what has been said we must conclude that there was not a fair trial of this case. If it appears probable that the verdict was enhanced thereby, the judgment must be reversed. The jury found for the defendant on the question of gross ⁶³⁸ negligence. That is a point in favor of the judgment. However, as counsel for defendant suggests, there is a strong indication in the amount of the verdict that, while the jury acquitted defendant of gross negligence, they were ruled by the idea pressed upon them throughout the trial that damages should be assessed sufficiently high to roundly punish the defendant when they came to assess the plaintiff's compensatory damages. The indications are that the idea of damages as mere compensation for loss sustained was too involved in their minds with the idea of punishing appellant to enable them to intelligently or dispassionately pass upon the vital questions in the case.

The evidence as regards the nature of the plaintiff's injury and the result was to the following effect: The large bone of the right leg below the knee was broken transversely downward. There was a displacement, giving the injury the character of what is called a compound fracture. It was not specially painful. Plaintiff recovered, so far as probably he ever will recover, in a few months. He was forty-five years of age when injured. His business was mainly office work. He was sufficiently restored to enable him to attend to such business substantially as formerly. The restored limb is not quite as strong as before. It is not wholly in its normal condition and never will be. The ligaments at the knee joint are so impaired that the joint is more than normally mobile. That permits a slipping outward as the weight of the body is thrown upon the imperfect limb. He is required, in using his limb, to use care and favor the impaired member. He has not full control of the limb because, as indicated, the ligaments of the knee are to some extent permanently relaxed. He testified that his only

difficulty in using his limb was that there was a looseness in the knee joint permitting the leg to bow out about an inch as he threw his weight upon it and that it troubled him some in moving about.

⁶³⁹ An examination of the numerous cases that have come to this court furnishes clear indication that twelve thousand dollars for the loss above indicated is far beyond what is legitimate. Plaintiff was not prevented from going about his customary affairs more than six months. There was no special circumstance distinguishing the injury from that of an ordinary compound fracture of one of the legs below the knee. There was no extensive laceration of the tissues of the limb. There was no extraordinary amount of pain suffered. There was a pretty rapid recovery, and a complete healing of the wounds. The permanent impairment of earning power is not large. There is no evidence of reasonable certainty of future pain and suffering from the injury. The amount awarded is equivalent to an annuity sufficient to enable plaintiff, with an ordinary family, to live in ordinary circumstances during his natural life. The mere statement of that is sufficient to demonstrate that the verdict is unreasonable in a high degree. A reference to verdicts in other cases will be of some service in determining how far the one in question is out of harmony with what is reasonable; but there is, after all, no test to be applied but that of human judgment. An examination of a large number of cases fails to bring to our attention one where anywhere near as large a verdict as the one before us has been sustained for a similar loss. Instances may be found in our books where there was the loss of a leg, with suffering probably as great as that of plaintiff and where there was as great or greater diminution of earning power, and the amount of compensation allowed was from sixteen hundred dollars to five thousand five hundred dollars. In *Karasich v. Hasbrouck*, 28 Wis. 569, there was a verdict for five thousand five hundred dollars. The plaintiff, a man twenty-eight years old, had two ribs broken. One leg was so badly bruised and wounded that pieces of the bone subsequently worked out through the wound. He was confined to his bed for some days, was under a surgeon's care for months, and was rendered permanently disabled from following his usual occupation and made reasonably ⁶⁴⁰ certain to suffer considerable pain for the rest of his life. In *Duffy v. Chicago etc. Ry. Co.*, 34 Wis. 188, a strong, healthy man sixty-four years of age was very severely and permanently injured,

the injury leaving him to some extent a cripple for life. The amount of damages awarded was sixteen hundred dollars. In *McMahon v. Eau Claire W. W. Co.*, 95 Wis. 640, 70 N. W. 829, five thousand dollars was allowed for a severe permanent injury to a young man, a member of the city fire department. In *Cummings v. National F. Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665, a middle-aged man was rendered helpless for life. The amount awarded to him was eight thousand dollars. In *Propson v. Leatham*, 80 Wis. 608, 50 N. W. 586, a laborer in good health, with a good prospect of long life, was seriously and permanently injured, one of his legs being broken, and after he was cured so far as practicable, the leg being left in a partially deformed condition, was awarded eighteen hundred dollars. In *McCoy v. Milwaukee Street Ry. Co.*, 88 Wis. 56, 59 N. W. 453, the sum of four thousand dollars was awarded for the loss, by a boy seventeen years old, of his left arm. In *Baltzer v. Chicago etc. Ry. Co.*, 89 Wis. 257, 60 N. W. 716, a recovery of ten thousand dollars was allowed for loss of the left arm of a boy nineteen years of age. In *King v. City of Oshkosh*, 75 Wis. 517, 44 N. W. 745, six hundred dollars was allowed to compensate a man for an injury causing considerable expense, loss of time, and a somewhat permanent impairment of earning power. In *Nadau v. White R. L. Co.*, 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135, nine thousand six hundred and fifty dollars was allowed for an injury to a strong young man. His leg was crushed and had to be amputated above the knee. These examples, though including cases of injuries quite dissimilar in kind to the one suffered by plaintiff, furnish a pretty good index of the amount usually found necessary, in the administration of justice, to compensate for pain and lost time incident to an injury and impaired earning power. We may well look, not so much to the particular nature of the injury in the cases, in comparing them with the one before us as to the magnitude ⁶⁴¹ of the elements of pain, loss of time, expense, diminished earning power, and the age of the subject. Those cases strongly support our conclusion that the verdict of the jury here was either the result of passion and prejudice or that the case was not intelligently considered by the jury; that they were swung away from the true basis for the assessment of damages by the errors we have discussed; that they thought as much or more of roundly punishing the appellant as of requiring it to make good to respondent the loss he sustained, upon a common-sense basis.

There being no controversy but that appellant is liable to respond for compensatory damages, this is a proper case for this court, upon reversing the judgment to name a sum which the plaintiff may accept and terminate the litigation if he sees fit. We will do that, being guided by the rule that, since defendant is left with no option in the matter, in order to avoid invading its substantial rights as to a judicial assessment of the damages it should pay, the sum named must be as low as in any reasonable probability a jury of twelve men, rightly instructed as to the law, and with a proper conception of their duty in the matter, would be liable to award: *Baxter v. Chicago etc. Ry. Co.*, 104 Wis. 307, 80 N. W. 644. It is our best judgment that the defendant ought not to be compelled under that rule to submit to the payment of more than two thousand five hundred dollars. That seems small compared with the verdict of the jury, but, unlike most cases where this court has been called upon to exercise its power to give parties an opportunity to end their litigation without a new trial, the verdict furnishes here no sort of assistance. A jury might reasonably assess plaintiff's damages as low as two thousand five hundred dollars. They might, of course, assess the same somewhat higher. The range of human judgment in respect to such matters is quite large. It is a very difficult matter to set boundaries beyond which it cannot go. It cannot be done at all with any very great degree of certainty. The ⁶⁴² best that can be done is to apply unbiased judgment and experience to the evidence. We have done that with the result suggested. If plaintiff does not see fit to accept the amount named, the way is open for him to appeal to another jury.

There is nothing further that need be said in this case. It is with much regret that we have been compelled to treat it as we have. We entertain a high regard for the learned, painstaking and conscientious judge who tried the case, and for the distinguished counsel who conducted the case for respondent. For the former, we can say it is but natural to lean somewhat for support in the course of a hotly contested trial, without time for reflection, upon eminent counsel, whose standing at the bar and whose large experience is an assurance against his consciously, or at all, proceeding to effect outside the legitimate boundaries of the case, especially in moving the judicial mind to the commission of error. But after all lawyers are not judges. Their sphere of action is different. However dis-

tinguished they may be, the only really safe way in any case is for the independent judgment of the judicial head of the court to dominate the trials. Counsel are liable to use all power they are masters of, if permitted, for the attainment of valuable results for their clients. The court must necessarily at all times himself control the scales of justice, keeping out those illegitimate make-weights that have no business therein, but which able counsel are liable, if not restrained, to throw into the balance upon their side of the case. The court can do that and still give counsel ample range for all their learning, ability and experience within the limits of the case, while repressing, and if necessary suppressing, excursions outside thereof.

By the Court. The judgment of the circuit court is reversed. The cause is remanded for a new trial unless the plaintiff elects, by notice in writing served upon the attorney for the defendant within twenty days after the filing of the remittitur in the office of the clerk of the trial court, to take ⁶⁴³ judgment for the sum of two thousand five hundred dollars, with costs in such court subsequent to such filing. If such election be made, judgment may be rendered accordingly upon application therefor to such court.

According to the Weight of Authority, when the act of a servant or agent is willful, wanton, malicious, or grossly negligent, but still within the scope of his authority, the master or principal is liable therefor in exemplary damages, the same as if he had committed the act, and although the act was not otherwise authorized than by the general authority of the agent or servant, and was not subsequently ratified. There are many decisions, however, to the contrary: See *Warner v. Southern Pac. Co.*, 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187; *Gulf etc. Ry. Co. v. Reed*, 80 Tex. 362, 26 Am. St. Rep. 749, 15 S. W. 1105; monographic notes to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 379-389; *Hoboken Printing Co. v. Kahn*, 59 Am. St. Rep. 589-609.

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2. **CONVEYANCE**—Acknowledgment of Before Interested Officer.—A stockholder in a corporation who is also a notary public is not disqualified to take and certify an acknowledgment of a conveyance to it. (Ohio St.) Read v. Toledo Loan Co., 663.

3. **MARRIED WOMEN**—Acknowledgment of.—A substantial compliance with the statute, in the certificate of acknowledgment of a married woman, is all that is required. (Idaho) Christensen v. Hollingsworth, 256.

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ADVERSE POSSESSION.

1. **ADVERSE POSSESSION**—What Constitutes.—Adverse possession of land against the title is always wrongful until its long continuation. (Am. St. Rep., Vol. 96—66 (1041))

tinuance has ripened title in the disseisor, and whether a wrongful possession is adverse always depends upon the character of the claim under which it is held. It must be hostile to the whole world and must be a claim of right against all persons, and not in subserviency to, or in recognition of the title of the true owner. (Ala.) *Ashford v. Ashford*, 82.

2. ADVERSE POSSESSION.—Possession to Become Adverse must be hostile in its inception and exclusive in its character. (Ill.) *Dewitt v. Shea*, 311.

3. ADVERSE POSSESSION—Minerals.—If a person goes into possession of land under a claim which does not include the minerals therein, his possession of the surface is not adverse to the true owner of the minerals, unless he does some act indicating that he claims the minerals. (Ala.) *Louisville etc. R. R. Co. v. Massey*, 17.

4. DOWER—Adverse Possession.—If, under the statute, a widow may retain possession of her husband's usual dwelling-house and the land belonging thereto until dower is assigned, her possession is not adverse to the heirs until such assignment is made. (Ill.) *Dewitt v. Shea*, 311.

5. ADVERSE POSSESSION Against Heirs—Marriage with Dowress.—One who comes into possession of land by marriage with a dowress does not hold adversely to her heirs, in the absence of proof of an actual surrender of possession to him, and his payment of taxes and improvement of the property does not make his possession adverse. (Ill.) *Dewitt v. Shea*, 311.

6. ADVERSE POSSESSION—Administrator and Heir.—If an administrator assumes that he has power and authority in that capacity to take possession of the lands of the decedent and hold them, and he does take and hold them under such supposed authority, though in fact, he has no such power or authority, his possession, though wrongful, is not adverse to the heirs of the decedent, and can never become adverse to them so long as he claims to hold the land in his representative capacity. (Ala.) *Ashford v. Ashford*, 82.

7. ADVERSE POSSESSION—Administrator and Heir.—If one takes possession of and holds land of a decedent as his administrator, and subsequently claims to hold it in his own right, such claim does not operate to give an adverse character to his possession, as against the heirs of the decedent, unless and until a knowledge of such claim is brought home to them. (Ala.) *Ashford v. Ashford*, 82.

8. ADVERSE POSSESSION—Administrator and Heir—Husband and Wife.—If a person takes possession of land as administrator for a decedent, or at any time holds possession in that capacity, and while so in possession passes the possession over to his wife, but continues to reside on the land without visible marks of a change of possession, and no repudiation by him of the original character of his possession brought to the knowledge of the heirs of such decedent, they are entitled to recover against him and those claiming under his wife, however long such possession of the wife may have continued before suit is brought. (Ala.) *Ashford v. Ashford*, 82.

9. ADVERSE POSSESSION—Administrator and Heir—Husband and Wife—Evidence.—If an administrator as such takes possession of the lands of a decedent, and claims that such possession was afterward transferred to his wife, who held adversely to the heirs and in her individual capacity, evidence is admissible to show that the administrator took possession as such, and so held it at the time that his wife's possession begun and continued, and a petition by him as administrator to sell the land for division among the heirs and the

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10. ADVERSE POSSESSION—Administrator and Heir—Husband and Wife—Evidence.—If an administrator takes possession of land of a decedent as his administrator, and claims that his possession was afterward transferred to his wife, who held adversely to the heirs of such decedent, it is competent for them to prove in rebuttal of evidence to show notice to them of the nature of her possession, that during all of the time her husband lived with her on the land, gave in the taxes on the land, and paid them as administrator, and that after his wife's death he held himself out to the heirs as being in possession of the land as such administrator. (Ala.) *Ashford v. Ashford*, 82.

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2. APPELLATE PRACTICE.—Objections to a Master's Report on a certain point not taken in the court below are deemed to be waived and cannot be urged on appeal. (Ill.) *Smyth v. Stoddard*, 314.

3. APPEAL.—In Reviewing the Action of a Trial Court in Controlling a Verdict by a peremptory instruction, the question is whether, upon the testimony presented, a jury could find a contrary verdict, which, in the exercise of a sound legal discretion, must be supported by the court in which judgment is sought and upon which judgment must follow. (N. J. L.) *Meyer v. Madreperla*, 536.

4. APPEAL.—Review of Misconduct in Argument.—If the bill of exceptions does not show what counsel said, the appellate court cannot consider whether or not his argument before the jury was objectionable. (Ky.) *Illinois Cent. R. R. Co. v. Josey*, 455.

5. APPEAL.—Dismissal—Estoppel.—A person who obtained the dismissal of an appeal on the ground that the decree from which it was taken was not final, is estopped to afterward claim as against a bill of review, that such decree was final. (Ala.) *Taylor v. Crook*, 26.

6. APPELLATE PROCEEDINGS.—Judgment, What Amounts to a Reversal and not a Modification of.—A mandate contained in an opinion of an appellate court declaring that, for the reasons stated, the judgment is reversed and the cause remanded, with directions that the trial court enter judgment in accordance with the views here expressed, amounts to a reversal and not to a modification, though the same result might have been reached by an order directing the modification of the judgment. (Cal.) *Cowdery v. London etc. Bank*, 115.

7. APPELLATE PROCEEDINGS.—Reversal of Judgment, Effect of.—When an order is entered in an appellate court reversing a judgment, it is forthwith vacated, and no longer remains in existence. (Cal.) *Cowdery v. London etc. Bank*, 115.

8. APPELLATE PROCEEDINGS—Action of the Trial Court After Remittitur.—A trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court. That order is conclusive on the parties, and no judgment or order different from or in addition to that directed by it can have any effect, though it may be such as the appellate court ought to have directed. (Cal.) *Cowdery v. London etc. Bank*, 115.

9. APPELLATE PROCEDURE—Where an Appellate Court, Finding the Judgment Appealed from to be for too Large an Amount, orders that it be reversed, with directions to the trial court to enter judgment in accordance with the views expressed, this direction does not authorize or permit the trial court to modify the judgment appealed from by reducing its amount. Such judgment is terminated by the reversal, and the order of the appellate court can be pursued only by the entry of a new judgment. (Cal.) *Cowdery v. London etc. Bank*, 115.

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BANKS AND BANKING.

1. BANK—When a Holder for Collection Only.—A bank with which a check has been deposited and which credits the amount thereof provisionally to its depositor, and which then indorses the check with the clearing-house stamp, "Pay only through the clearing-house," must be regarded as a holder for collection only, when the constitution of the clearing-house provides that "the stamp shall be for clearing-house purposes only, and shall guarantee the validity and regularity of all prior indorsements on the paper so cleared, except the indorsement of the original payee of a certificate of deposit, and it shall not be construed to supply a missing indorsement." Such indorsement does not import an undertaking that the check has not been altered, and does not make the bank receiving payment through the clearing-house liable as for money had and received for the excess of the altered check above the amount for which it was drawn, where the amount of the check has been paid over to the depositor without notice of the alteration. (Cal.) *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 169.

2. BANKING—Check—Bank Collecting, When does not Represent Itself to be the Owner.—If a check which has been deposited in a bank by a depositor is by it placed in the clearing-house with the clearing-house stamp on its back, "Pay only through the clearing-house," where it is honored under the clearing-house rules by the payment to the clearing-house of the balance found due against the correspondent of the bank on which the check was drawn and the crediting to the other bank of the amount of the check, whereupon it paid the proceeds, or a greater part thereof, to its depositor, such action on the part of the bank which placed the check in the clear-

ing-house does not amount to a representation that it is the owner of the check, and hence no recovery can be had, if it has paid over the proceeds of the check to its depositor, though it appears that he had altered such check so as to greatly increase its amount. (Cal.) Crocker-Woolworth Nat. Bank v. Nevada Bank, 169.

3. BANKING—Recovery of Money Paid upon an Altered Check. If one bank pays to another a check held by the latter for the purpose of collection, which has been altered by greatly raising its amount, and the receiving bank turns the money over to the person for whom it collects the check, it is not liable in an action for money had and received brought by the bank making such payment for the excess of the raised check over the sum for which it was originally drawn. (Cal.) Crocker-Woolworth Nat. Bank v. Nevada Bank, 169.

4. BANKING.—The Presentment of a Check Through the Clearing-house and Receiving Payment Thereof Carries Merely a Warranty that the bank presenting and receiving payment has no knowledge of any defects. It is, therefore, not liable for moneys received by it, though the check had been raised as to amount, if, without notice, it pays over the moneys so received to its principal or depository, to whom the check belonged. (Cal.) Crocker-Woolworth Nat. Bank v. Nevada Bank, 169.

5. BANKING—Raised Check—Recovery of Money Paid upon.—Where a forgery consists in changing the body of a check so as to raise the amount, as the drawee is not charged with knowledge of the handwriting of whomsoever may have prepared the body of the check, he may, even if negligent, recover upon the ground of mistake, if his recovery would not pass the burden of the loss to an innocent payee who had changed his condition upon the faith of the payment; that is to say, where the drawee has done any act to give currency to the paper, as by acceptance, etc., on the faith of which the holder has taken, or the condition of the holder will be altered for the worse as where he received the check for collection and paid over the proceeds to his principal before receiving notice of the alteration, then the party paying is precluded from recovering by the ordinary rules of estoppel; otherwise not. (Cal.) Crocker-Woolworth Nat. Bank v. Nevada Bank, 169.

6. BANKING—Liability of Bank Presenting an Altered Check Through the Clearing-house.—A bank which presents a check to the clearing-house with the clearing-house stamp thereon, "Pay only through the clearing-house," does not warrant that the check is in all respects what it purports to be, and is not answerable for moneys received by it, on the ground that the check was altered as to the amount, if, without knowledge of such alteration, it pays such money to its principal or depository. (Cal.) Crocker-Woolworth Nat. Bank v. Nevada Bank, 169.

7. A SAVINGS BANK Paying Out Moneys of a Deceased Depositor to a Person not Entitled Thereto cannot be exempted from liability on the ground that it exercised due care, nor because its by-laws provide that all payments made to persons producing a pass-book shall be valid payments to discharge the institution. This by-law must be read with another by-law of the institution declaring that, after a depositor's death, payment must be made to his or her legal representatives. (N. Y.) Mahon v. South Brooklyn Sav. Inst., 603.

BENEFIT SOCIETY.

1. MUTUAL BENEFIT ASSOCIATIONS—Estoppel Against.—The doctrine of estoppel applies to mutual benefit associations in re-

gard to their insurance contracts substantially the same as against ordinary insurance companies and other corporation. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

2. MUTUAL BENEFIT ASSOCIATIONS—Power of to Amend By-laws as Against Pre-existing Contracts.—The power reserved by a mutual benefit association to make changes in the rules, by-laws, and regulations of the order warrants only reasonable variances in insurance contracts. Hence, if a member has paid assessments for a long time, contributed to meet matured obligations of a specified sum for each member, no subsequent amendment of the constitution or by-laws can change such sum to an indefinite amount, probably much less than that sum. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

3. MUTUAL BENEFIT ASSOCIATIONS—By-laws.—The right of a benefit society is no broader than that possessed by any other corporation as to making or amending by-laws. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

4. MUTUAL BENEFIT ASSOCIATIONS—By-laws.—Attempted Changes in Insurance Contracts between benefit societies and their members under the reserved power to amend by-laws, rules, and regulations, which are manifestly unfair, are void. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

5. MUTUAL BENEFIT ASSOCIATIONS—By-laws Requiring Application to the Grand Lodge to Settle Differences.—By-laws forming part of a contract of insurance providing that in case any difference arises between any member and his lodge concerning benefits coming to him or his heirs, he and they have the right and duty to apply to the grand lodge before commencing suit in any court, do not cover controversies respecting whether one is or is not a member of the order. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

6. MUTUAL BENEFIT ASSOCIATIONS—By-laws, Waiver of by Failure to Plead.—If a by-law of a mutual benefit association requires a member to apply to the grand lodge before bringing suit, the failure to urge in the answer noncompliance with such by-law waives it. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

7. MUTUAL BENEFIT ASSOCIATIONS—Power of the Courts Over.—Though, to a large extent, voluntary associations are independent of judicial control, when they proceed so arbitrarily as to manifestly violate the private rights of their members, they are amenable to the law the same as any other person, natural or artificial, as where they attempt to nullify their contracts of insurance and to substitute others therefor of an entirely different plan under the guise of changing the by-laws, rules, and regulations for the efficient administration of the plan. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

8. MUTUAL BENEFIT ASSOCIATIONS—Waiver of the Submission of Claim to the Grand Lodge.—If the by-laws of an association provide that differences concerning benefits coming to the member or his heirs shall not be subject to a suit at law until after application to the grand lodge for redress, this is equivalent to an agreement to submit to arbitration, and is waived by the denial by the association of all liability against it under its certificate. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

9. MUTUAL BENEFIT ASSOCIATIONS—Dues, Nonpayment of, When does not Forfeit Rights.—If a mutual benefit association

notifies one of its members that his certificate will not be recognized as in force, it waives further payments thereon so long as its attitude in that regard continues. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

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BILLS AND NOTES.

1. **NEGOTIABLE INSTRUMENTS.**—An Implied Warranty of Genuineness Accompanies the Unrestricted Indorsement and transfer of any negotiable instrument. It is an assurance to the drawee of its genuineness in all respects save that of the name of the drawer alone, with which knowledge the drawee is charged. (Cal.) *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 169.

2. **CONSIDERATION.**—A Pre-existing Debt is a Sufficient Consideration for the execution of a new note, so far as the sureties thereon are concerned, if such prior debt is canceled on the delivery of the new note. (Cal.) *Stroud v. Thomas*, 111.

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BILLS OF LADING.

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BONDS.

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BOYCOTTING.

BOYCOTTING—What is not.—The refusal of the proprietors of patent or proprietary medicines to sell any of their medicines to a wholesale druggist at the price fixed for sales to other wholesalers, unless he will agree not to resell them except at specified prices, which are the same prices fixed for the sale by all other wholesale druggists, is not a boycott. (N. Y.) *Park etc. Co. v. National etc. Druggists' Assn.*, 578.

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BUILDING AND LOAN ASSOCIATION.

1. **BUILDING AND LOAN ASSOCIATION**—Assignment for Creditors.—Under proper circumstances, a building and loan company may liquidate its business by the agency of a voluntary assignment. (Ky.) *Globe B. & L. Co. v. Wood*, 417.

2. **BUILDING AND LOAN ASSOCIATION**—Assignment for Creditors.—In determining whether a building and loan association is insolvent so as to justify its making an assignment for the benefit of creditors, a different rule is applicable than in the case of an ordinary corporation whose business is almost entirely with outsiders. (Ky.) *Globe B. & L. Co. v. Wood*, 417.

3. BUILDING AND LOAN ASSOCIATION—Assignment for Creditors.—If the objects of a building and loan association are frustrated and it cannot meet its obligations, there being a panic among the stockholders, a scramble among the nonborrowers to withdraw, and an inability of the company to pay withdrawing members or obtain funds to lend to stockholders and therefore to mature its stock, the directory may make an assignment for the benefit of creditors. (Ky.) *Globe B. & L. Co. v. Wood*, 417.

4. BUILDING AND LOAN ASSOCIATION—Transfer by Member of Mortgaged Land.—If a member of a building and loan association sells the land which he has mortgaged to the company to secure a loan and thereafter the purchaser makes the payments on the stock, it is immaterial so far as concerns the lien of the company, whether there is an actual transfer to him of the stock. (Ky.) *Globe B. & L. Co. v. Wood*, 417.

5. BUILDING AND LOAN ASSOCIATION—Credit for Dues Paid.—When a borrowing member of a building and loan association is sued by its assignee in insolvency, he is entitled to no credit on his loan for dues paid and properly carried to the stock account, except when the court conducting the administration is satisfied that the entire amount of the stock account will not be needed to pay the expenses, losses and costs of administration. (Ky.) *Globe B. & L. Co. v. Wood*, 417.

CARRIERS.

1. RAILWAYS.—A Rule Exacting Train or Increased Rates of a Passenger who does not purchase a ticket before entering the car is a valid and reasonable regulation, which it is the duty of the conductor to enforce, and of the passenger to conform to. (N. Y.) *Monnier v. New York Cent. etc. R. R. Co.*, 619.

2. RAILWAYS.—It is not the Duty of a Conductor to Inquire and Determine whether a ticket office was kept open as required by law, before the departure of a train. He is authorized to exact train rates of any passengers whom he finds to be without a ticket. If there is some fact or omission not apparent on the face of the transaction, the passenger must resort to some other remedy for his grievance besides resistance to the conductor. (N. Y.) *Monnier v. New York Cent. etc. R. R. Co.*, 619.

3. RAILROAD or Other Passenger Tickets are not Property in which third persons can have vested rights. They are mere tokens or evidences of a right to transportation held by the purchaser, to which the carrier has title, and the ultimate right of possession. (Tex. Cr. Rep.) *Jannin v. State*, 821.

4. RAILWAYS—Passenger's Right to Resist Conductor.—A passenger who was unable to procure a ticket before the starting of a train, because the ticket office was not kept open for the full time specified by law, and of whom the conductor, therefore demanded train rates, is not justified in refusing to pay such rates and in resisting the conductor who undertakes to put him off for nonpayment of the fare demanded, though the passenger offers to pay the price of a ticket when bought at the station. He should pay the train rate as demanded, or peaceably submit to expulsion from the train, and pursue his remedy in either event by an action against the corporation. (N. Y.) *Monnier v. New York Cent. etc. R. R. Co.*, 619.

5. RAILROADS—Passengers—Expulsion from Train.—A railway conductor having reasonable regard for the safety of the life and

limb of a drunken and boisterous passenger has a right to eject him from the train, at a proper place and under suitable conditions. (Ala.) *Nash v. Southern Ry. Co.*, 19.

6. **RAILROADS—Negligence—Proximate Cause.**—The voluntary departure of a passenger from a railway train at his destination is not the proximate cause of his death thereafter while he is a trespasser on the railroad track. (Ala.) *Nash v. Southern Ry. Co.*, 19.

7. **COMMON CARRIERS—Special Contract—Negligence.**—A common carrier receiving goods for transportation under a special limitation of liability is a common carrier still, and liable for negligence. (Conn.) *Mears v. New York etc. R. R. Co.*, 192.

8. **COMMON CARRIERS—Negligence—Evidence.**—A shipper of goods by railroad who shows that he shipped them in good condition and they were received in bad condition makes out a prima facie case of negligence against the carrier, and if the latter relies upon a special contract limiting its liability, the burden is upon it, not only to prove the contract but also that the injury in question fell within its terms. (Conn.) *Mears v. New York etc. R. R. Co.*, 192.

9. **COMMON CARRIERS—Shipping Receipt—Condition of Goods.**—A shipping receipt for goods received boxed and "in apparent good order, except as noted, contents and condition of contents of packages unknown," does not raise a presumption of law that the goods themselves were in good condition when delivered to the carrier, nor prevent him from proving what their actual condition was when delivered. (Conn.) *Mears v. New York etc. R. R. Co.*, 192.

10. **COMMON CARRIERS—Negligence.**—Evidence of care taken by a drayman of a consignee on rainy days in delivering goods is not admissible to show the care taken on fine days, nor is it admissible to show the care he actually took on any particular rainy day, to establish the negligence of a common carrier. (Conn.) *Mears v. New York etc. R. R. Co.*, 192.

11. **COMMON CARRIERS—Damages—Evidence.**—If a shipper sues a carrier for damage to goods while in transit, evidence that the consignee's drayman looked at the box containing the goods after its arrival, and did not complain of its condition, is admissible on behalf of the carrier to show that there was nothing wrong with its condition at that time. (Conn.) *Mears v. New York etc. R. R. Co.*, 192.

12. **COMMON CARRIERS—Special Contract—Connecting Carriers.**—A special contract between shipper and carrier limiting the latter's liability in respect to damage by wetting is binding upon the shipper if accepted by him or his authorized agent in consideration of a reduced rate of freight, and if it purports to inure to the benefit of a connecting carrier it is effectual for that purpose. (Conn.) *Mears v. New York etc. R. R. Co.*, 192.

13. **COMMON CARRIERS—Evidence.**—Whether Conditions in a Shipping Receipt are just and reasonable may be shown by the fact that the shipper was offered two forms of receipt at different risks and rates and that he chose the one in question. (Conn.) *Mears v. New York etc. R. R. Co.*, 192.

See Constitutional Law, 11-13; Railroads.

Note.

- Carriers**, passenger tickets, sale of, municipal ordinances regulating, when valid, 832.
- passenger tickets, sale of, power of the legislature to restrict to specified persons, 828.
- passenger tickets, sale of, statutes controlling and limiting to certain persons do not interfere with interstate commerce, 830.
- passenger tickets, sale of, statutes restricting to certain persons do not deprive persons of property without due process of law, 831.
- passenger tickets, sale of, statutes restricting to specified persons are not class legislation, 833.
- passenger tickets, sale of, statutes restricting, to whom apply, 833.

CHASTITY.

See Witnesses, 5, 6.

CHATTEL MORTGAGE.

CHATTEL MORTGAGES—When Vest All Property Rights in the Mortgagee.—If a chattel mortgage is past due, the property covered thereby must be regarded as the property of the mortgagee. The mortgagor while he has a right of redemption has no property in the mortgaged chattels, within the meaning of a section of the Revised Statutes of Ohio providing that, when the property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor within three months prior to the appointment of such assignee, receiver, or trustee shall first be paid out of the trust fund in preference to all claims, except for taxes and the costs of administering the trust. The trust fund so referred to is what remains in the hands of the assignee or trustee, after the payment of valid liens and securities. (Ohio St.) St. Marys Machine Co. v. National Supply Co., 677.

See Execution.

CHECKS.

See Banks and Banking; False Pretenses.

COMBINATIONS IN TRADE.

See Trusts and Monopolies.

COMITY.

See Statutes, 7.

COMMERCE.

INTERSTATE COMMERCE—Peddlers—Occupation Tax.—A statute by which peddlers of goods, going from place to place to sell, are required, under a penalty, to take out and pay for a license, and which makes no discrimination between residents and products of the state and those of other states, is not, as to peddlers of goods previously sent them by manufacturers in other states, void as an at-

tempt to regulate interstate commerce. Such peddlers are engaged in internal commerce, and may be compelled to pay the license, or suffer the penalty exacted by the statute. (Tex. Cr. Rep.) *Saulsbury v. State*, 837.

Note.

Community Property. See Husband and Wife.

CONFLICT OF LAW.

See Executors and Administrators, 13-18; Statutes, 7, 8.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW, Who may Raise Question.—One who does not belong to a class that might be injured by a statute cannot question its constitutionality. (Cal.) *Estate of Johnson*, 161.

2. CONSTITUTIONAL LAW—Wisdom of Statute.—Courts will not pass upon the wisdom or the sufficiency of the reason for the provisions of a statute which is not in conflict with some constitutional provision. Such questions are for the legislature alone. (Wash.) *State v. Sharpless*, 893.

3. POLICE POWER and Taxing Power Distinguished.—In the case of municipal corporations, the police power extends merely to the regulations of those matters confided by the legislature to the municipality for that purpose, including the power to exact reasonable fees, not for the purpose of revenue, but only incidental to the power of regulation; the power of taxation is exerted to compel citizens and property owners to contribute to the support of the municipal government. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

4. CONSTITUTIONAL LAW—Right of the State to Confer Privileges on Its Own Citizens.—The provision of the constitution that the citizen of each state shall be entitled to all the privileges and immunities of citizens in the several states does not prohibit a state from conferring such privileges and immunities on its own citizens as it may deem fit, but secures to the citizens of the other states the same rights, privileges and immunities. (Cal.) *Estate of Johnson*, 161.

5. CONSTITUTIONAL LAW—Place of Trial.—A statute authorizing the prosecution of the offense of rape in some county other than the one where the crime is committed or in some county of the district, does not violate that clause of the national constitution which provides that in criminal prosecutions the accused shall enjoy the right to a speedy trial in the district in which the crime shall have been committed. Such limitation applies only to procedure in the national courts and not to procedure in state courts as to crimes committed within the state. (Tex. Cr. Rep.) *Mischer v. State*, 780.

6. CONSTITUTIONAL LAW—Local and Class Legislation.—A statute to regulate the practice of barbering is not local, class, or special legislation simply because it divides the communities of the state into classes for each of which different regulations are provided, when the statute operates equally upon all barbers coming within such respective classifications. (Wash.) *State v. Sharpless*, 893.

7. CONSTITUTIONAL LAW—Local and Class Legislation.—Although a statute regulating the practice of barbering provides for

the issuance of a certificate without examination upon the payment of a small fee to all barbers then carrying on business in certain cities, while barbers subsequently coming into such cities are required to stand an examination and pay a larger fee, it is not void as discriminating against one class of citizens in favor of others, because such law operates equally upon all who fall under the operation of its provisions. (Wash.) *State v. Sharpless*, 893.

8. CONSTITUTIONAL LAW—Application of Statute.—A statute which by its provisions clearly applies to all incorporated cities and towns applies to all such cities and towns whether incorporated at the time of the passage of the statute or thereafter. (Wash.) *State v. Sharpless*, 893.

9. CONSTITUTIONAL LAW—Retroactive Laws which affect the remedy are valid and constitutional, provided they do not interfere with some vested right. (Tex. Cr. Rep.) *McKennon v. State*, 802.

10. CONSTITUTIONAL LAW—Retroactive Laws Enlarging Remedy—Notice of Appeal.—A statute dispensing with the necessity of notice of appeal in justices' courts, and by express terms having a retroactive effect, simply enlarges the remedy without interfering with vested rights, and hence is constitutional and valid. (Tex. Cr. Rep.) *McKennon v. State*, 802.

11. CONSTITUTIONAL LAW—Sale of Passenger Tickets.—A statute confining the sale of railroad or other passenger tickets to the agents of the company issuing them, and making it a penal offense for any other person to sell them, is a valid exercise of the police power and not unconstitutional as tending to create a monopoly or as depriving a person of his property without due process of law. (Tex. Cr. Rep.) *Jannin v. State*, 821.

12. CONSTITUTIONAL LAW—Sale of Passenger Tickets—Statute Regulating.—A statute making the sale of a railroad passenger ticket by other than an agent of the company a penal offense when it contains upon its face a statement that such sale is penal, but leaving it optional with the company whether or not the ticket shall contain such statement, is void under a constitutional provision forbidding the legislature to delegate its authority to suspend a law. It is also unconstitutional in failing to define with certainty an offense, and as not of itself creating an offense, and as giving to a railroad company the option to create an offense. (Tex. Cr. Rep.) *Jannin v. State*, 821.

13. CONSTITUTIONAL LAW—Sale of Passenger Tickets.—The state may, in its constitutional exercise of the police power, prevent the pursuit of the occupation of a passenger ticket broker and restrict the right to sell such tickets to agents prescribed by statute, under a penalty for its violation. (Tex. Cr. Rep.) *Jannin v. State*, 821.

See Criminal Law; Jury, 1; License; Municipal Corporations, 8-13; Statutes; Taxation; Venue.

Note.

Constitutional Law, passenger tickets, statutes restricting the sale of to agents of carriers, 628-634.

CONTEMPT.

CONTEMPT OF COURT—Disobedience to Void Injunction.—A person committed for contempt of court in disobeying an injunction which the court has no jurisdiction to issue is entitled to his discharge on habeas corpus. (Ill.) *People v. Barrett*, 296.

CONTRACTS.

1. CONSIDERATION—Agreement to Pay a Sum to a Third Person.—An agreement by one person to pay his debt to another by paying it to a third person does not require that there be any consideration for the promise between the immediate promisee and the third person. (Wis.) *Tweeddale v. Tweeddale*, 1003.

2. CONSIDERATION.—The Payment of Part of a Debt Already Due is not a sufficient consideration to support an agreement for forbearance to sue. (Cal.) *Stroud v. Thomas*, 111.

3. CONTRACTS—Promise to Pay Money to a Third Person.—Where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties establishing the essential privity between the promisor and the third person requisite to binding contractual relations between them resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction, and the liability is as binding between the promisor and the third person as it would be if the consideration of the promise moved from the latter to the former and such promisor made the promise directly to the third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence. The liability, being once created by the acts of the immediate parties to the transaction, neither one, nor both of them, can thereafter change the situation as regards the third person without his consent. (Wis.) *Tweeddale v. Tweeddale*, 1003.

4. CONTRACTS—Breach—Damages—Profits.—If persons enter into a contract by which one agrees to furnish labor and materials or erect a structure for the other, and, having begun, such other wrongfully prevents him from completing the contract as agreed, although he is at all times ready, able and willing to perform it, he is entitled to recover, for the breach of the contract, the profits that would have accrued to him from its full performance. (Ala.) *Peck-Hammond Co. v. Heifner*, 36.

Note.

Conveyances. See Registration of Conveyances.

CONVERSION.

See Trover and Conversion.

CORPORATIONS.

1. CORPORATIONS—Directors' Meetings.—No Presumption exists that a conference of a majority of the directors of a corporation is a regular board meeting, and that legal notice thereof has been given to the absent directors when no record of the conference has been made. (Conn.) *New Haven Trust Co. v. Doherty*, 239.

2. CORPORATIONS—By-laws, Power of to Change.—The power of a corporation to make by-laws is limited to what is reasonable under the circumstances of each case. If, resolving fair doubts in favor of its action, the boundaries of reason have been exceeded, to that extent is the action of the corporation ultra vires. (Wis.) *Wuerfler v. Trustees of Grand Grove W. O. D.*, 940.

3. CORPORATION—Ultra Vires, Estoppel to Urge.—When a contract made by a corporation has been so executed that, to allow the

corporation to repudiate it would work injustice to the other party thereto, who has in good faith relied thereon, the doctrine of estoppel applies and prevents such repudiation, regardless of whether the corporation had the right to make the contract or not, unless its act in that regard was in violation of some written law of the state, or sound public policy. (Wis.) *Wuerfler v. Trustees of Grand Grove* W. O. D., 940.

4. **CORPORATIONS—Trust Funds.**—The officers of a going corporation are not trustees of its creditors, nor are its assets held as a trust fund for them. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

5. **CORPORATIONS—Express Trusts.**—The Officers and Directors of a Corporation are not Trustees of an Express Trust, and cannot, on the ground that they are such trustees, be held liable to suit on a cause of action against which the statute of limitations has run. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

6. **CORPORATIONS—Director's Liability for Negligence.**—A director of a corporation, when acting as its agent in the conduct of its business, may be personally responsible to it for his negligence or misconduct. (Conn.) *New Haven Trust Co. v. Doherty*, 239.

7. **CORPORATIONS—Liability of Directors.**—Ordinarily directors in a corporation acting in good faith and within the scope of their authority are not liable for the disastrous consequences of a mere mistake of judgment, and their liability for negligence and misconduct in managing the affairs of the corporation must depend upon the terms of their agency and the particular circumstances of the case. (Conn.) *New Haven Trust Co. v. Doherty*, 239.

8. **CORPORATIONS—Liability of Director for Negligence.**—If the directors of a life insurance company actively engaged in the management of its business and the investment of its funds, and presumably paid for their services, arrange for and carry out an appropriation of the company's funds as a loan upon insufficient security and in violation of statute, their duty in respect to the loan is analogous to that of a trustee in respect to an investment of the trust fund in a manner unauthorized by the terms of the trust, and mere good faith is not sufficient to exempt them from personal liability. In such case they are bound to exercise diligence in investigating as to the values of the securities and safety of the loan and use ordinary care and prudence in acting on the facts known to them, and in failing to do so they act negligently and become personally liable for the resulting loss. (Conn.) *New Haven Trust Co. v. Doherty*, 239.

9. **CORPORATIONS—Liability of Director—Measure of Damage.**—If the directors in a corporation actively engaged in the investment of its funds act negligently and wrongfully in investing them on insufficient security, the money and interest thus lost, as the direct result of the wrong, measure their personal liability. (Conn.) *New Haven Trust Co. v. Doherty*, 239.

10. **CORPORATIONS—Liability of Directors—Advice of Counsel.** If the power of the directors of a corporation in dealing with its funds is doubtful, requiring some legal knowledge for the correct understanding of its limits, the directors may be entitled to some protection for their negligent acts when acting under the advice of counsel, but such advice cannot avail them where the terms of the power are plain and explicit. (Conn.) *New Haven Trust Co. v. Doherty*, 239.

11. **CORPORATIONS—Liability of Directors—Evidence.**—If the directors of a corporation having the active management of its funds,

make a loan thereof upon insufficient security and in excess of their authority, resulting in a total loss, it is not incumbent upon the corporation suing therefor to prove the exact value of the securities at the time of the loan. (Conn.) *New Haven Trust Co. v. Doherty*, 239.

12. CORPORATIONS—Insurance—Enforcing Liability of Members.—When a corporation is adjudged insolvent and a receiver appointed, the right to enforce liability against its members accrues. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

13. CREDITORS' SUIT Against Corporation, What is, and What May be Granted in.—An action against a corporation by some of its creditors to have it adjudged insolvent and to wind up its affairs is a creditor's suit under the statutes of Wisconsin, and all the rights of creditors, officers, stockholders, and members must be worked out in that suit. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

14. CORPORATIONS—Creditors' Suit—Defense to.—In an action by creditors of a corporation suing in its behalf the same defenses may be interposed by the defendants as if the suit were brought by the corporation. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

15. CORPORATIONS—Receiver of—Cause of Action Against—In Whose Favor Accrues.—If a cause of action accrues against the receiver of a corporation for moneys converted by him to his own use and because of gross misconduct in the management of the receivership, such cause accrues in favor of his successor in office, but not in favor of the creditors of the corporation. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

16. LIMITATIONS—Statute of.—Where creditors suing in behalf of a corporation seek to enforce a cause of action upon which it might have sued, the statute of limitations bars such suit if it would have barred the suit had it been brought by the corporation. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

17. LIMITATIONS—Statute of.—In an Action Against Directors and Other Officers of a Corporation brought by its creditors in its behalf to recover for misfeasance and malfeasance in office, the cause of action must be regarded as arising, and the statute of limitations as commencing to run, at the dates of the acts complained of. In this respect the rule is the same whether the suit is brought by the corporation itself or by its creditors suing in its behalf. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

18. LIMITATIONS, Statute of, in Favor of a Plaintiff Subsequently Made a Defendant.—Where a suit is commenced by several plaintiffs against a corporation to have it adjudged insolvent and to wind up its affairs, and some of such plaintiffs are subsequently, by an amended complaint, made parties defendant, with a view to asserting a cause of action against them in favor of the corporation, the action, as to such cause, cannot be regarded as commenced against them prior to the filing of such amended complaint. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

19. LIMITATIONS—Statutes of in Favor of Stockholders and Members of a Corporation.—Upon the appointment of a receiver for a corporation which has been adjudged insolvent, a cause of action at once accrues against its members or stockholders for the enforcement of their liability as such, and the statute of limitations thereupon commences to run in their favor. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

20. LIMITATIONS—Statute of, Runs in Favor of a Defendant Until He is Made a Party to the Action.—If a creditors' suit is commenced against a corporation to which parties defendant are added after its commencement, the statute of limitations continues to run in their favor, notwithstanding the pendency of the action, until they are made parties defendant and summons is issued against them. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

See Acknowledgments, 2; Deeds, 2.

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COSTS.

COSTS—Stenographer's Fees.—A master in chancery is not entitled to an allowance as costs for stenographer's fees for taking testimony before him. (Ill.) *Smyth v. Stoddard*, 314.

COTENANCY.

See Tenancy in Common.

COURTS.

1. JURISDICTION—Attack on an Appeal from a Court Which did not have Jurisdiction.—That a cause gets into a court by appeal from a court which did not have jurisdiction over it, rather than by original pleading and process, is but an irregularity not affecting any substantial right, and one which may be and is waived by the parties' proceeding to trial on the merits without objecting to the right of the court to proceed. (Ohio St.) *In re Estate of Crawford*, 648.

2. JURISDICTION.—The Mere Fact that a Defendant has Knowledge of a suit pending against him is not sufficient to give the

court jurisdiction; notice, as required by law, must be given, or his voluntary appearance shown. (Idaho) *Strode v. Strode*, 249.

COVENANTS.

A COVENANT OF GENERAL WARRANTY does not by itself include a covenant against encumbrances. (Ohio St.) *People's Sav. Bank Co. v. Parisette*, 672.

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CREDITOR'S SUIT.

See *Corporations*, 13-20.

CRIMINAL LAW.

1. **ALIBI—Attempt to Commit Burglary.**—If, on a trial for attempt to commit burglary, the only proof of an alibi, is defendant's denial, that he was at the place where the crime was committed, no distinct charge upon alibi need be given. (Tex. Cr. Rep.) *Byas v. State*, 762.

2. **CRIMINAL LAW—Principal in Crime—What Constitutes.**—To constitute a person accused of crime a principal therein he must be present thereat and knowing and adopting the unlawful intent of the other parties, he must aid by acts, or encourage by words or gestures, and consent to the commission of the crime. It is not necessary that the principal, being present, should do some act at the time in order to constitute him a principal; but he must encourage by acts or gestures, either before, or at the time of the commission of the offense with full knowledge of the intent of the persons who commit the offense; otherwise he cannot be convicted as a principal. (Tex. Cr. Rep.) *Chapman v. State*, 874.

3. **CRIMINAL LAW—Principal in Crime.**—The mere knowledge that an offense is being committed or about to be committed, together with the accused's presence and ownership or part ownership of the place where the crime occurs, is not sufficient to constitute the accused a principal in the commission of the offense. (Tex. Cr. Rep.) *Chapman v. State*, 874.

4. **MURDER—Accomplice—Insufficient Verdict.**—If the statute makes it mandatory that a verdict for murder specify the degree of murder of which the accused is found guilty, and that an accomplice to a crime shall be punished in the same manner as a principal, a verdict against an accomplice to murder which does not express the degree is essentially insufficient to support a verdict and judgment of conviction. (Tex. Cr. Rep.) *Thomas v. State*, 834.

5. **MURDER—Degrees of—Evidence—Instructions.**—If on the trial of an accomplice, the evidence is very cogent of a killing upon express malice constituting murder in the first degree the accused cannot complain because he was given the benefit of a charge to the jury submitting to its consideration an inferior degree of murder. (Tex. Cr. Rep.) *Thomas v. State*, 834.

6. MURDER—Evidence—Charge of Court.—On the trial of an accused as an accomplice the testimony of the alleged principal that the accused advised him to kill the deceased and furnished him with a gun for that purpose, is sufficient direct evidence to justify a refusal to charge on circumstantial evidence. (Tex. Cr. Rep.) *Thomas v. State*, 834.

7. MURDER—Accomplice's Confession of Principal as Evidence. On the trial of a person accused as an accomplice the confession of the principal is admissible to show the guilt of the latter and the commission of the crime, but it is not admissible to prove the guilt of the alleged accomplice. (Tex. Cr. Rep.) *Thomas v. State*, 834.

7a. CRIMINAL TRIALS.—Evidence in corroboration of the testimony of an accomplice is not necessarily confined to points directly connecting the accused of the crime. (Conn.) *State v. Gallivan*, 203.

8. CRIMINAL LAW—Defense of Insanity.—An instruction defining the degree of insanity which will render one criminally irresponsible for homicide, as such a defect of reason as to disable him from knowing the nature of his act, or, if he did know, from knowing that it was wrong, is erroneous. The absence of self-control by reason of unsoundness of mind is omitted. (Ky.) *Jolly v. Commonwealth*, 429.

9. CRIMINAL LAW—Defense of Insanity.—The True Test of criminal responsibility is whether the accused has sufficient reason to know right from wrong, and whether he has sufficient power of control to govern his action. (Ky.) *Jolly v. Commonwealth*, 429.

10. AUTREFOIS ACQUIT—Striking out of Plea.—A plea of former acquittal is properly stricken out if the indictment show a former acquittal for a distinct offense from that for which the defendant is being tried. (Tex. Cr. Rep.) *Byas v. State*, 762.

11. AUTREFOIS ACQUIT—Distinct Crimes.—A former acquittal for an attempt to commit a rape, is not a bar to a prosecution for an attempt to commit a burglary for the purpose of committing the rape, although it was the same transaction. The two crimes are distinct. (Tex. Cr. Rep.) *Byas v. State*, 762.

12. AUTREFOIS ACQUIT—Murder by Distinct Acts.—If the killing of two persons is by distinct and separate acts, though done at the same time and as part of the same transaction, an acquittal for the killing of one is not a bar to a prosecution of the same person for the killing of the other. (Tex. Cr. Rep.) *Augustine v. State*, 765.

13. FORMER JEOPARDY—Jurisdiction—Void Indictment.—Jurisdiction of the court trying the case is an essential prerequisite to a plea of once in jeopardy, and if the indictment under which the trial is had is void, the court acquires no jurisdiction. (Tex. Cr. Rep.) *Ogle v. State*, 860.

14. FORMER JEOPARDY—Void Indictment.—An acquittal or conviction obtained upon a void proceeding or indictment is not a bar to a subsequent indictment and prosecution for the same crime. (Tex. Cr. Rep.) *Ogle v. State*, 860.

15. FORMER JEOPARDY—Void Indictment—Illegal Grand Jury. Under a constitution, expressly providing that a grand jury shall consist of twelve men, an indictment found by such jury composed of more or less than twelve men is utterly void and not the basis of jurisdiction, nor, after trial thereunder, of a plea of former conviction or acquittal. (Tex. Cr. Rep.) *Ogle v. State*, 860.

16. FORMER JEOPARDY—Void Indictment—Jurisdiction by Consent.—Consent cannot confer jurisdiction to try an accused for a crime under a void indictment, so as to make the judgment in such case the basis for a plea of former jeopardy, or in bar of a subsequent prosecution under a valid indictment for the same offense. (Tex. Cr. Rep.) *Ogle v. State*, 860.

17. MURDER—Former Jeopardy—Question for Jury.—If, on a plea of former jeopardy, it is shown that there were two acts constituting but one contemporaneous transaction, one intent and one volition on the part of the accused, though two persons may have been assaulted or killed in such single transaction, an acquittal for one of the acts is a bar to a prosecution for the other. In such case the question whether such acts constituted one transaction, one intent, and one volition, is a question of fact for the jury, and it is error to strike out the plea of former jeopardy without submitting it to the jury. (Tex. Cr. Rep.) *Cook v. State*, 854.

18. MURDER.—Declarations of One Accused of Murder concerning the difficulty made five or ten minutes thereafter and within one hundred yards of the scene thereof, are admissible as part of the *res gestae*. (Tex. Cr. Rep.) *Honeycutt v. State*, 797.

19. MURDER—Res Gestae.—Declarations by deceased one hour and one-half after a burning of his body which afterward resulted in his death, to the effect that someone unknown to him threw turpentine on him and that he had twenty-six dollars on his person at the time, are admissible in evidence as part of the *res gestae* on the trial for his murder. (Tex. Cr. Rep.) *Chapman v. State*, 874.

20. MURDER—Res Gestae.—Declarations by the deceased in answer to questions made four hours after a burning of his body, which subsequently resulted in his death are not admissible in evidence as part of the *res gestae* on a trial for the murder of the deceased. (Tex. Cr. Rep.) *Chapman v. State*, 874.

21. CRIMINAL LAW.—Admission of Irrelevant or Inadmissible Evidence does not require a reversal of a judgment of conviction unless its effect upon the defendant's case was probably injurious, and if he is given the minimum punishment after his guilt is shown beyond question, the admission of such evidence cannot have had an injurious effect upon him. (Tex. Cr. Rep.) *King v. State*, 792.

22. CRIMINAL TRIALS.—Juries Should Consider Evidence bearing on the question of guilt as a whole and not dissect it into unconnected fragments for separate consideration regardless of their relation to each other. (Conn.) *State v. Gallivan*, 203.

23. CRIMINAL TRIALS—Degree of Proof Required.—Only the essential ingredients of the crime need be proved beyond a reasonable doubt, and a lower degree of proof may suffice as to circumstances which, while they are of importance in leading to a conclusion of guilt, are not essential to support it. (Conn.) *State v. Gallivan*, 203.

24. CRIMINAL LAW—Reasonable Doubt.—In Instructions on reasonable doubt it is best simply to follow the language of the statute: "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal." (Ky.) *Jolly v. Commonwealth*, 429.

25. CRIMINAL TRIALS—Reasonable Doubt—Questions for Jury. If, besides the facts proven, beyond a reasonable doubt tending to sustain a hypothesis of defendant's guilt, there are other facts established by a preponderance of the evidence which are inconsistent with the theory of the defense, the jury may properly consider them

as bearing upon the reasonableness of such theory. (Conn.) *State v. Gallivan*, 203.

26. CRIMINAL TRIALS—Reasonable Doubt—Moral Certainty.—Juries are at liberty to adopt any hypothesis as to the defendant's guilt which to their minds is established beyond a reasonable doubt, and it is not necessary to instruct them that such hypothesis must be established to a moral certainty by circumstances proved beyond a reasonable doubt, which are inconsistent with any other hypothesis. (Conn.) *State v. Gallivan*, 203.

27. CRIMINAL TRIALS.—An Hypothesis of Guilt cannot be pronounced unreasonable in any case, which might be reasonably assumed upon a consideration of the facts in evidence, or of such facts together with inferences legitimately founded upon them. The evidence need not go directly to support it. (Conn.) *State v. Gallivan*, 203.

28. CRIMINAL TRIALS—Theory of Defense—Error.—The jury has a right to pass upon the intrinsic probability of a theory of innocence presented by the defense, when applied to the facts before it, without first asking if there is any positive testimony as to the facts upon which such theory is presupposed. To instruct otherwise is reversible error. (Conn.) *State v. Gallivan*, 203.

29. CRIMINAL TRIALS.—The Accused has the Right to claim that no crime has been proved against him, or that if any crime has been proved, it is not the one charged in the indictment, and to have the jury properly instructed as to both claims. (Conn.) *State v. Gallivan*, 203.

30. CRIMINAL LAW—Evidence of Other Crimes.—Under an indictment charging a person with obtaining money under false pretenses in selling certain goods, evidence of other sales of the same kind of goods made after the finding of such indictment is inadmissible. (R. I.) *State v. Letourneau*, 696.

31. CRIMINAL LAW—Imprisonment Under Void Indictment—Credit for Time Served.—An accused convicted and sentenced under a void indictment and subsequently released upon habeas corpus, is not, upon his conviction and sentence under a subsequent valid indictment for the same crime, entitled to a credit upon his second term for the time served by him under such void conviction. (Tex. Cr. Rep.) *Ogle v. State*, 860.

32. CRIMINAL LAW—Conviction Under One Count—Error as to Other Counts.—If an accused is convicted under one count in an information, error, or supposed error in instructing the jury as to other counts is immaterial. (Tex. Cr. Rep.) *Witherspoon v. State*, 812.

33. TRIAL—Improper Conduct of Counsel.—A person on trial for murder is not subject to have his hands "jerked up violently in the presence of the jury" by the prosecuting counsel for the purpose of showing whether or not such hands have scars or burns on them. Such procedure should not be indulged in nor permitted. (Tex. Cr. Rep.) *Chapman v. State*, 874.

See Bail; Venue.

Note.

Criminal Law, reasonable doubt, what establishes guilt beyond, 210.

CURATIVE STATUTE.

See Acknowledgments, 6.

DAMAGES.

1. NEGLIGENCE.—The Measure of Damages in an Action Against a Master for the Negligence of His Servant is the same whether the negligence is ordinary or gross. (Wis.) *Rueping v. Chicago etc. Ry. Co.*, 1013.

2. DAMAGES—Excessive.—A verdict or judgment for damages will not be disturbed as excessive if there is nothing in the record to indicate that they are so outrageously large as to induce the belief that their award must have been actuated by prejudice, partiality, or corruption, or that they were induced by improper considerations, upon a misunderstanding or misapplication of the evidence. (Ind. Ap.) *Cincinnati etc. R. R. Co. v. Worthington*, 355.

3. JURY TRIAL—Verdict—When Excessive.—Where the evidence shows that the plaintiff's leg was broken by an accident admitted to have resulted from the negligence of the defendant's servants, that plaintiff was forty-five years of age, that he will never entirely recover from the effect of his injury, that he remains able to carry on his business substantially as before, a verdict for twelve thousand dollars is excessive, and may be set aside by the appellate court. (Wis.) *Rueping v. Chicago etc. Ry. Co.*, 1013.

4. JURY TRIAL—Right of the Appellate Court to Name a Sum Which the Plaintiff may Accept.—Where there is no contention that the defendant is not liable to respond in compensatory damages, but the appellate court finds that the sum awarded by the jury was excessive, it may properly, upon reversing the judgment, name a sum which the plaintiff may accept and terminate the litigation if he sees fit. (Wis.) *Rueping v. Chicago etc. Ry. Co.*, 1013.

See Contracts, 4; Death; Parent and Child; Witnesses, 2.

DEATH.

1. DEATH—UNBORN CHILD—When may not Recover for, because of a Recovery by the Widow.—There can be but one action and one recovery of damages for the death of a person. If the action is maintained and a judgment recovered by his widow, his posthumous child, born after such recovery and whose existence was unknown to the defendant in the action, cannot maintain a further action on the ground that he was conceived before such former action was commenced, though the statute of the state declares that a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent death. (Cal.) *Daubert v. Western Meat Co.*, 154.

2. DEATH FROM WRONGFUL ACT—Distribution of Damages for.—The fact that the complaint in an action for damages for death by wrongful act omits to name the children by a former marriage does not deprive them of the right to share in the damages recovered for the death of their father. (Ind. App.) *Duzan v. Myers*, 341.

3. DEATH FROM WRONGFUL ACT—Damages—Distribution—Emancipation of Child.—Although a son is practically emancipated and has been living with, and supported by, a third person for a number of years, this does not prevent the son from sharing in damages recovered for the death of his father. (Ind. App.) *Duzan v. Myers*, 341.

4. DEATH BY WRONGFUL ACT—Damages — Distribution — Adult Child.—An adult who has been living away from home for a number of years, and has been given but slight support by her father is entitled to share in damages recovered for his death by wrongful act. (Ind. App.) *Duzan v. Myers*, 341.

5. DEATH—Punitive and Compensatory Damages.—An administrator is entitled to compensatory damages if the death of his intestate results from negligence, and to punitive damages if it results from gross negligence. (Ky.) *Illinois Cent. R. R. Co. v. Josey*, 455.

See Evidence, 4.

DEDICATION.

See Vendor and Vendee, 7.

DEEDS.

1. CONVEYANCES—Acknowledgment—Failure of Notary to Affix His Seal.—The authentication by the notary's seal is just as essential to a perfect acknowledgment as is his signature, and when a deed lacks this, it is not entitled to be recorded. (Iowa) *Koch v. West*, 394.

2. CONVEYANCE—Witnesses to—When not Disqualified by Interest.—The fact that the subscribing witnesses to a deed are stockholders in the corporation grantee, or have some other interest not apparent on the face of the deed, does not disqualify them from acting as such witnesses. (Ohio St.) *Read v. Toledo Loan Co.*, 663.

3. DEEDS—Right of Way.—A deed containing a boundary on "an intended street" grants an appurtenant private right of way thereon. (Ala.) *Teasley v. Stanton*, 88.

4. DEEDS—Record as Evidence of Delivery.—The record of a deed is prima facie evidence of its delivery, and who ever questions this must assume the burden of proving that it was not delivered. (Ill.) *Dewitt v. Shea*, 311.

5. CONVEYANCES—Recording—Index.—A purchaser is not bound to look beyond the proper index for information as to conveyances, and if such index shows none, there is no constructive notice of any. (Iowa) *Koch v. West*, 394.

6. CONVEYANCES.—Unrecorded Deeds are Valid as against all persons except purchasers and encumbrances for valuable consideration and without notice. (Iowa) *Noyes v. Crawford*, 363.

See Acknowledgments.

Note.

Definition of onerous title, 916.

of the goodwill of a business, 610.

of voluntary payments, 81.

DIVORCE.

DIVORCE—Service by Publication.—If, in a suit for divorce, the record fails to show that a copy of the summons was sent to the defendant, when the order directs that to be done, the service by publication is not complete, and does not give the court jurisdiction. (Idaho) *Strode v. Strode*, 249.

Note.

Divorce, void marriage cannot support a suit for, 269.

DOWER.

1. **DOWER as Between First and Second Wives.**—If a divorced wife is entitled to dower, she takes it subject to the homestead of the second wife, and the latter takes dower subject to the dower estate of the first wife and to her own homestead right. (Ill.) *Potter v. Clapp*, 322.

2. **DOWER—Demand for.**—A contract between a widow and heirs, whereby she is to remain in possession of the estate and collect rents pending a settlement of the respective rights of the parties, makes a demand for dower on her part unnecessary. (Ill.) *Potter v. Clapp*, 322.

3. **COVENANTS—Dower.**—A Covenant of Warranty is not Broken by the outstanding, inchoate right of dower. (Ohio St.) *People's Sav. Bank Co. v. Parisette*, 672.

See Adverse Possession, 4-10; Specific Performance, 4.

Note.

Drummers, license taxes, when may be exacted of, 847-849.
taxation upon by the states, 848, 849.

DRUNKENNESS.

See Negligence, 7.

EASEMENTS.

EASEMENTS—Private Ways by Prescription.—A private way by prescription can be acquired only by a continuous, uninterrupted, adverse use of the way under a claim of right, and with the knowledge and acquiescence of the owner, of the land. Permissive use is not sufficient to establish a prescriptive right. (Ind. App.) *Kibbey v. Richards*, 333.

See Deeds, 3.

EJECTMENT.

1. **EJECTMENT.**—Mining Rights include incorporeal hereditaments which lie in grant and not in seisin and cannot be recovered in an action of ejectment. (Ala.) *Louisville etc. R. R. Co. v. Massey*, 17.

2. **EJECTMENT—Title—Evidence.**—If a party in a statutory action of ejectment tenders an abstract of the title upon which he will rely, on compliance with the statute, and on the trial is allowed, without objection from his adversary, to introduce evidence in support of title or claim of title other than that specified in his abstract, he is entitled to go to the jury on the title which his evidence tends to support, and may recover upon such title if proved. (Ala.) *Louisville etc. R. R. Co. v. Massey*, 17.

3. **EJECTMENT—Improvements—Setoff of Rents and Profits.**—A judgment in ejectment for rents and profits can be reduced or even satisfied out of the award to the defendant for the value of improvements. (Mo.) *Tice v. Fleming*, 479.

4. **EJECTMENT—Rent and Profits—Setoff of Improvements.**—If a plaintiff in ejectment, after recovering a judgment for the land and the value of rents and profits, practically abandons it, he must, in subsequently enforcing the money part of his judgment, consent

to a setoff of the defendant's award for improvements. (Mo.) *Tice v. Fleming*, 479.

5. **EJECTMENT—Paying for Improvements.**—A Statutory Provision that the plaintiff in ejectment shall pay for improvements made by the defendant in good faith does not invade the constitution in making the owner pay for improvements to which he has not consented. While he does not expressly consent thereto, he is presumed to know of his ownership and what is being done on the premises. (Mo.) *Tice v. Fleming*, 479.

ELECTIONS.

1. **ELECTIONS—Contests—Ballots as Evidence.**—The production of ballots in a contested election case after they have been offered in evidence in another contest, merely requires proof that they have not been tampered with. (Ill.) *People v. Barrett*, 296.

2. **EQUITY JURISDICTION Over Political Rights.**—Courts of equity have no jurisdiction to enjoin an election board from producing, counting and canvassing ballots in a contested election case. (Ill.) *People v. Barrett*, 296.

EMINENT DOMAIN.

1. **EMINENT DOMAIN.—Authority to Take Property** for a permanent public use does not necessarily imply power to take property for a temporary public use. (Conn.) *City of Waterbury v. Platt Brothers & Co.*, 229.

2. **EMINENT DOMAIN—Limitation of Power.**—If power to exercise the right of eminent domain is delegated to a private or municipal corporation, the extent of the power is limited by the express terms or clear implication of the statute authorizing its exercise. (Conn.) *City of Waterbury v. Platt Brothers & Co.*, 229.

3. **EMINENT DOMAIN—Power to Take Property Temporarily.**—If the legislature has power to take property under the exercise of the right of eminent domain for a limited period of time, its intention to do must be clearly expressed. (Conn.) *City of Waterbury v. Platt Brothers & Co.*, 229.

4. **EMINENT DOMAIN—Damages for Temporary Use—Evidence.**—A city claiming the right to discharge its surface and sewer drainage upon the property of a lower proprietor for a limited period of time merely upon paying him damages therefor, must show its legislative authority by clear and specific terms definitely expressed. (Conn.) *City of Waterbury v. Platt Brothers & Co.*, 229.

ENTIRETIES.

See Husband and Wife, 4-6.

EQUITY.

MISTAKE—Recovery of Money Paid by.—Where Equally Innocent Persons have dealt with one another under a mistake, the burden of loss resulting from the common error will ordinarily be left where the parties have placed it, and a recovery may be had only where, in equity and good conscience, the defendant should be called upon to refund. (Cal.) *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 169.

See Elections, 2; Executors and Administrators, 2; Jury, 2.

ESTATE BY ENTIRETIES.

See Husband and Wife, 4-6.

ESTATE OF DECEDENT.

See Executors and Administrators.

ESTOPPEL.

ESTOPPEL by Silence.—To sustain an estoppel because of an omission to speak, there must be both the specific opportunity and the apparent duty to speak; the person maintaining silence must have known that some one was relying thereon, and was either acting or about to act as he would not have done had the truth been told. (R. L.) Hunt v. Reilly, 707.

See Husband and Wife, 3.

EVIDENCE.

1. **EVIDENCE—Judicial Notice.**—A Railroad Torpedo Should be Considered a dangerous agency as a matter of law. (Wis.) Euting v. Chicago etc. Ry. Co., 936.

2. **EVIDENCE—Judicial Notice.**—Courts will take judicial notice that 3:20 A. M., in October is not daylight. (Ind. App.) Cincinnati etc. R. R. Co. v. Worthington, 355.

3. **EVIDENCE.**—The Records of the Weather Bureau kept at one place are admissible as evidence to show the state of the weather at a place ten miles distant at a particular time; if the weather conditions are shown to be usually the same at both places. (Conn.) Mears v. New York etc. R. R. Co., 192.

4. **EVIDENCE.**—The Presumption of Death from Seven Years' Absence, under the New Jersey death act, is not one of fact, but of law, which stands as proof of death, and fixes the time of death at the expiration of the seven years. (N. J. L.) Meyer v. Madreperla, 536.

5. **EXPERT EVIDENCE, When Competent, Must Go to the Jury** as any other competent testimony and the jury is the sole judge of the weight of such evidence. (Wash.) Nelson v. McLellan, 902.

See Criminal Law; Homicide; Negligence; Witnesses.

EXECUTIONS.

EXECUTIONS—Levy upon Mortgaged Chattels.—A statute requiring payment or security to the mortgagee upon a levy made upon mortgaged chattels is for the benefit of the mortgagee alone, and not for the benefit of the mortgagor who has no right to interfere with the proceeding. The mortgagee may waive the right to payment of or security for, the mortgage debt and assent to the levy which is valid as against a subsequently executed mortgage of the same chattels. (Iowa) Tollerton etc. Co. v. Skelton, 409.

See Exemptions.

Note.

Execution, mortgaged chattels, right of officer to levy upon, 689.
municipal corporations, whether may waive their immunity from garnishment for the salaries of their officers, 451, 452.

Execution, salaries of county, town, and city officers are not subject to, 448.

salaries of officers of municipal corporations, special statutes respecting the garnishment of, 450, 451.

salaries of school teachers, whether subject to, 452.

salaries of state and United States officers are not subject to, 449.

See Public Officers.

EXECUTORS AND ADMINISTRATORS.

1. **WEARING APPAREL—Jewelry.**—Neither a watch, a watch-chain, a finger ring, nor a diamond shirt stud are articles of wearing apparel, within the meaning of a statute providing for the distribution of the wearing apparel of a decedent. (Ind. App.) *Coffinberry v. Madden*, 349.

2. **EQUITY JURISDICTION.**—While equity will not ordinarily assume jurisdiction over the settlement of decedent's estates, yet it may do so in a proper case. (Ill.) *Potter v. Clapp*, 322.

3. **ESTATES OF DECEDENTS—Debts—Conversion of Realty into Personalty.**—A conversion of the lands of a decedent authorized by his will for the purpose of division, does not make it personalty so far as it involves its liability for the payment of debts. (Ala.) *Taylor v. Crook*, 26.

4. **BILLS OF REVIEW—Estates of Decedents.**—On a bill to review a decree allowing a credit on the settlement of an administrator's account for services of an attorney, the question whether the evidence supports the finding of fact on which the decree is based is not open for consideration, and merely the question as to whether the item was a legal charge under the facts may be considered. (Ala.) *Taylor v. Crook*, 26.

5. **ESTATES OF DECEDENTS—Proceeding to Sell Land.**—A petition by an administrator asking for a reference to ascertain the value of the professional services of an attorney in obtaining the probate of the will of the decedent is not a proceeding to have the lands of the estate sold to pay the value of such services ascertained to be due. (Ala.) *Taylor v. Crook*, 26.

6. **ESTATES OF DECEDENTS—Statute of Limitations.**—Adversary proceedings to subject the lands of a decedent to the payment of debts, whether contracted by him or his personal representative, and though for costs of administration, whether the creditor is such personal representative or a third person, must be begun within the period of limitation or the debt is barred. (Ala.) *Taylor v. Crook*, 26.

7. **ESTATES OF DECEDENTS—Debts—Statute of Limitations.** Proceedings to charge the lands or proceeds of lands of a decedent for any debt incurred by him or by his executor or administrator must be inaugurated against the estate in due form, as to parties and declared purpose within the period of the statute of limitations. (Ala.) *Taylor v. Crook*, 26.

8. **ESTATES OF DECEDENTS—Debts—Statute of Limitations.** Lands descending to heirs or devisees of a decedent can be charged for debts against the estate only by proceedings of an adversary character setting up the nature of the debt and seeking a decree for the sale of such lands for its payment, and such proceeding must be commenced within the period of the statute of limitations. (Ala.) *Taylor v. Crook*, 26.

9. ESTATES OF DECEDENTS—Probate of Will—Attorney's Fee—Statute of Limitations.—A claim against the estate of a decedent for an attorney's fee in probating the will of the decedent accrues on the probate of the will, and adversary proceedings against the estate to subject the lands of the decedent to the payment of such debt must be commenced within the period of limitation thereafter. (Ala.) *Taylor v. Crook*, 26.

10. ESTATES OF DECEDENTS—Debts—Attorney's Fee—Statute of Limitations.—An attorney's fee for services in probating a will is not a debt against the estate of the decedent in the nature of costs, against which the statute of limitations does not run in favor of the heirs and devisees. (Ala.) *Taylor v. Crook*, 26.

11. ESTATES OF DECEDENTS—Debts—Attorney Fees.—If an executor employs an attorney to have a will probated, the value of such attorney's services is not in the first instance a debt or charge against the real estate of the decedent, but is a charge against the executor. (Ala.) *Taylor v. Crook*, 26.

12. ESTATES OF DECEDENTS.—Claim for Attorney Fees in probating a will is not a liability against the land of the decedent except when such land has been sold for the payment of his debts. (Ala.) *Taylor v. Crook*, 26.

13. RES JUDICATA—Order of Court of a Sister State.—The Settlement of Accounts of a Special Administrator and as Executor made by a court of another state having jurisdiction, and affirmed by the supreme court of that state, is conclusive upon the courts of this state as a final adjudication of those accounts. (Ohio St.) *In re Estate of Crawford*, 648.

14. ADMINISTRATION—Extraterritorial Effects of Grants of. Every Grant of Letters Testamentary or of Administration is confined in its operation to the limits of the territory of the government which grants it, and does not de jure extend to other countries. Whatever operation is allowed to it beyond that territory is a mere matter of courtesy which any state or nation is at liberty to yield or withhold, according to its own policy and procedure. (Ohio St.) *In re Estate of Crawford*, 648.

15. FOREIGN ADMINISTRATORS.—An Administrator, Though with the Will Annexed, cannot intermeddle with the effects of the testator in another state unless permitted to do so by its laws. (Ohio St.) *In re Estate of Crawford*, 648.

16. EXECUTORS Cannot, as Such, Have any Authority Over Property Situated in Another State so long as it is controlled by a special administrator appointed in that state, and it is of no consequence that he is one of the persons named as executors. (Ohio St.) *In re Estate of Crawford*, 648.

17. CONFLICT OF LAWS—Property in Another State Devised to Executors in Trust.—Though a testator devises his property to his executors named in his will, to be held in trust as therein specified, this does not authorize them to administer the trust as to property situate in another state in any other way or manner than subject to its laws. (Ohio St.) *In re Estate of Crawford*, 648.

18. RES JUDICATA.—An Adjudication of a Court of Another State as to the Estate of a Decedent there Situate cannot be questioned in the state wherein he died and where his will was admitted to probate and executors appointed, unless it is shown that the adjudication was without jurisdiction. (Ohio St.) *In re Estate of Crawford*, 648.

19. JURISDICTION—Waiver of Right to Object to.—Where persons interested under a will appear in a probate court of another state, and, after a decision there against them, appeal to a higher court, where the cause is tried on its merits without any objection to the jurisdiction, they are bound by the decision, and must be regarded as waiving all objections to the jurisdiction, if any existed. (Ohio St.) *In re Estate of Crawford*, 648.

See Adverse Possession, 4-10.

EXEMPTION.

EXEMPTION.—Harness and Cart used by the owner of a stallion as a means of conveyance when he is employed therewith are exempt from execution, as the property of a laborer. (Iowa) *Krebs v. Nicholson*, 370.

See Officers, 4-6.

EXPERT TESTIMONY.

See Evidence, 5.

EXPLOSIVES.

See Negligence, 1.

EXTRADITION.

1. EXTRADITION—Validity of as Defense.—A person accused of crime committed within the state and extradited therefor from another state is not entitled to his release upon the ground that the extradition proceedings are void. The invalidity thereof can be availed of by him only in the state from which he is extradited. (Tex. Cr. Rep.) *Ex parte Baker*, 871.

2. EXTRADITION—Invalidity of, no Defense.—A person accused of crime committed within the state may be tried therein therefor although brought into the state from another state against his will and without lawful authority. (Tex. Cr. Rep.) *Ex parte Baker*, 871.

FALSE IMPRISONMENT.

1. FALSE IMPRISONMENT—Void Warrant.—Any person who procures the issuance of a void warrant of arrest is liable in damages to the person named therein if he is arrested under the authority it is supposed to import. (Ala.) *Oates v. Bullock*, 38.

2. FALSE IMPRISONMENT—Void Warrant.—A person who makes a proper and sufficient complaint before a magistrate for the purpose of having a warrant of arrest issued thereon for the person complained against, is not liable for false imprisonment when the magistrate, without fault on the part of the complainant, issues a paper intended to be a warrant, but which is void on its face, and the person charged is arrested and restrained of his liberty thereunder. (Ala.) *Oates v. Bullock*, 38.

3. FALSE IMPRISONMENT—Void Warrant.—If a person, after making a sufficient complaint before a magistrate charging another with a crime, by a negligent or wrongful act causes the magistrate to issue a void warrant for the arrest of such other person, it is not necessary, in order to render him liable for false imprisonment, that

his negligent or wrongful act should be the sole cause of the issuance of the warrant of arrest. If the fault of the person making the complaint combines with the fault of the magistrate in issuing the warrant, the imprisonment is caused by the fault of each and both. (Ala.) *Oates v. Bullock*, 38.

4. FALSE IMPRISONMENT—Arrest Under Void Warrant—Ratification.—If a person who makes an affidavit for an arrest before a magistrate has no knowledge that the latter has issued a void warrant thereon, under which the arrest is made, his employment of counsel to prosecute the person charged with crime and thus arrested cannot be construed as a ratification of the unlawful arrest under the void warrant so as to make him liable for false imprisonment. (Ala.) *Oates v. Bullock*, 38.

5. FALSE IMPRISONMENT—Evidence.—Plaintiff is entitled to show malice on the part of defendant in causing his arrest in order to enhance the damages for false imprisonment, whether malice is alleged or not, and on the other hand, defendant is entitled to show probable cause for causing the arrest in order to rebut the proof or imputation of malice. (Ala.) *Oates v. Bullock*, 38.

6. FALSE IMPRISONMENT—Arrest Under Void Warrant—Evidence.—A person sued for false imprisonment for an arrest made under a void warrant is entitled to show when the fact that such warrant had been issued came to his knowledge, to enable the jury to determine whether he had ratified the unlawful arrest by employing counsel and appearing on the day set for the trial of the person thus arrested. (Ala.) *Oates v. Bullock*, 38.

FALSE PRETENSES.

SWINDLING—Drawing Check on Bank Without Funds Therein.

It does not constitute the crime of swindling or any violation of law simply to draw a check on a bank where the drawer has no money on deposit. There must be some false and deceitful means resorted to at the time that a person obtains the money on the check, as representing that he has money in the bank, or that the check must necessarily be cashed, or otherwise, to constitute a crime. (Tex. Cr. Rep.) *Blackwell v. State*, 778.

FELLOW-SERVANTS.

See Railroads, 19, 20.

FIXTURES.

1. FIXTURES—Conditional Sale—Replevin.—If a dwelling-house, which is personal property, is sold under a conditional contract of sale, the vendor may, upon a breach of the conditions of sale, recover the house in an action of replevin. (Wash.) *Page v. Urick*, 924.

2. FIXTURES.—A Dwelling-house Built by Consent of a city upon one of its streets resting upon wooden blocks laid on the ground and by mistake constructed so as to extend over the street line upon adjoining property, but erected upon condition, that it might be removed upon notice from the city, is personal property. (Wash.) *Page v. Urick*, 924.

3. FIXTURES.—Corn-cribs erected by a tenant upon leased premises upon posts sunk into the ground are fixtures as against a subsequent purchaser of the premises without notice of a verbal

agreement for their removal between the grantor and such tenant. (Ill.) *Smyth v. Stoddard*, 314.

4. **FIXTURES.**—A Blacksmith-shop moved upon leased premises upon runners, left thereon, and removed thereon before the termination of the lease, does not become a fixture. (Ill.) *Smyth v. Stoddard*, 314.

4a. **LANDLORD AND TENANT**—Contracts as to Fixtures.—If a landlord agrees to pay his tenant the reasonable value of a barn erected by the latter or allow him to remove it upon the delivery of possession under his lease, the landlord cannot insist upon a strict compliance with such contract if, by selling the leased property including the barn, he puts it beyond the tenant's power to deliver possession to him. (Ill.) *Smyth v. Stoddard*, 314.

5. **LANDLORD AND TENANT**—Conversion of Fixtures.—If a landlord agrees to pay his tenant the reasonable value of a barn erected by the latter or to allow him to remove it upon delivery of possession under his lease, a sale of the property including the barn by the landlord amounts to a conversion of the latter, and the tenant is entitled to recover its reasonable value from such landlord. (Ill.) *Smyth v. Stoddard*, 314.

6. **LANDLORD AND TENANT**—Liability of Landlord for Value of Fixtures.—If a landlord sells leased property including a barn erected by his tenant under an agreement that his landlord should pay him the reasonable value thereof on surrender of the property, the fact that such tenant afterward rents the property from the grantee of such landlord does not relieve the latter from liability to the tenant for the reasonable value of the barn as it stood at the time he made the sale. (Ill.) *Smyth v. Stoddard*, 314.

FORECLOSURE.

See Judgments; Mortgages.

FORGERY.

1. **FORGERY**—Indictment—Revenue Stamps—Variance.—A revenue stamp forms no part of an instrument which is the subject of forgery, and it is entirely unnecessary to set it out or describe such stamp in an indictment charging forgery. An omission to allege its presence on the instrument constitutes no ground for variance between allegation and proof. (Tex. Cr. Rep.) *Beer v. State*, 810.

2. **FORGERY of Unstamped Instrument.**—It is not necessary to conviction of forgery that the forged instrument be stamped with a revenue stamp. (Tex. Cr. Rep.) *King v. State*, 792.

3. **FORGERY**—Subjects of.—If an instrument is void on its face, it cannot be the subject of forgery; but if it is valid on its face, though invalid in fact, or under the proof, it may be the subject of forgery. (Tex. Cr. Rep.) *King v. State*, 792.

4. **FORGERY**—Subject of—Married Woman's Note.—A married woman's note is not the subject of forgery if the fact that she is married appears from the face of the note, but if such fact does not appear therefrom, and proof of extrinsic facts are necessary to establish it, the note is the subject of forgery. (Tex. Cr. Rep.) *King v. State*, 792.

FORMER JEOPARDY.

See Criminal Law, 10-17.

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FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—Evidence.—An insolvent is a competent witness as to his knowledge of his own insolvency at the time of making a voluntary conveyance alleged to be fraudulent as to creditors. Any inference, arising from the facts that he acted in collusion with the adverse party, affects the weight, but not the admissibility, of such testimony. (Conn.) *Supplee v. Hall*, 188.

2. FRAUDULENT CONVEYANCES.—Evidence of the fact, unexplained, that a man in failing circumstances who transfers property to secure an existing debt without new consideration, also, on the day following such transfer, substantially stripped himself of all his visible property by voluntary conveyances to his son, is admissible to show that the transfer to his creditor was made with a view to his insolvency and to defraud his other creditors. (Conn.) *Supplee v. Hall*, 188.

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GAS.

1. NEGLIGENCE—Gas Meters.—A declaration stating that a dangerous machine called a slot meter was placed in plaintiff's house by a gas company, but not stating that the meter had any direct relation to the injury sustained, or that it was defective in any way, or, if so, that plaintiff had no means of knowledge of the defect, whereby he is unable to state in what the defect consisted, is insufficient to sustain a claim for damages caused by the meter through the negligence of the gas company. (R. I.) *Smith v. Pawtucket Gas Co.*, 713.

2. NEGLIGENCE—Liability of Gas Companies—Duty to Inspect Pipes.—No general obligation on the part of a gas company can be inferred to inspect gas-pipes in a private house which are not under the control of the company, and as to which it has no apparent relation other than the fact that its gas is to be used through pipes placed therein by the owner, as it has suited him to have them. (R. I.) *Smith v. Pawtucket Gas Co.*, 713.

3. LANDLORD AND TENANT—Application for Gas.—If an owner lets a house supplied with gas-pipes, permission to use the pipes is to be presumed and a consequent authority to apply for gas, and, although the application therefor is made by the tenant, the landlord is as much responsible for the condition of such pipes as though he had applied for the gas himself. (R. I.) *Smith v. Pawtucket Gas Co.*, 713.

See Municipal Corporations, 8-13.

GIFTS.

GIFT to a Third Person—When Enforceable.—An agreement between a creditor and his debtor that the debtor will pay the debt

to a third person is enforceable by the latter, though it was in the nature of a gift to him. The exchange of promises between the creditor and the debtor is sufficient to bind the latter to such third person. (Wis.) *Tweeddale v. Tweeddale*, 1003.

See Husband and Wife, 1.

GOODWILL.

See Partnership.

GRAND JURY.

CRIMINAL LAW—Failure to Indict—Rearrest.—If one grand jury fails to indict a person accused of crime, he may be subsequently arrested and held to await the action of another grand jury, especially when there is new evidence tending to connect him with the crime. (Tex. Cr. Rep.) *Ex parte Baker*, 871.

See Criminal Law, 15.

GUARDIAN AND WARD.

GUARDIAN AND WARD—Payment of Taxes—Right to Lien. A guardian for minors holding land as tenants in common with adult persons, who pays delinquent taxes on the common property with his own funds to protect the interests of his wards, is entitled to a lien on the lands for the amount so paid as against all of the owners thereof. (Wash.) *Burgert v. Caroline*, 889.

HABEAS CORPUS.

1. **HABEAS CORPUS.**—In the Case of Insurrection or Rebellion, the governor or the military officer in command may, for the purpose of suppressing it, suspend the writ of habeas corpus, or disregard it if issued. (Idaho) *In re Boyle*, 286.

2. **HABEAS CORPUS—Insurrection.**—The Truth of Recitals in a governor's proclamation that a certain county is in a state of insurrection and rebellion will not be inquired into or reviewed on an application for habeas corpus. (Idaho) *In re Boyle*, 286.

HIGHWAYS.

1. **HIGHWAYS—Municipal Liability for Defects in.**—If a highway is so raised above the adjoining ground as to be unsafe for travel without a sufficient railing or fence on its sides, the absence of such railing or fence is by statute a defect in the highway, and a person injured by means thereof without fault in himself, may recover just damages against a town allowing its highway to remain in that condition. (Conn.) *Upton v. Town of Windham*, 197.

2. **HIGHWAYS—Danger—Guards.**—The fright of a gentle horse at the passing of an automobile driven with ordinary care and at reasonable speed is an incident to the proper use of highway, and a danger to be guarded against by a municipality under the statute. (Conn.) *Upton v. Town of Windham*, 197.

3. **HIGHWAYS—Liability for Defects in.**—A penalty against municipalities for maintaining defective highways may be incurred when a person properly using a highway suffers a personal injury or loss of property not due to his culpable conduct nor to that of a

fellow-traveler, but being the direct result of a defective condition of the highway in relation to those events naturally incident to its use, and which naturally expose the traveler to danger happening when the highway is not in a reasonably safe condition. (Conn.) *Upton v. Town of Windham*, 197.

4. HIGHWAYS—Proper Use of—Defects in.—The passing of an automobile driven with ordinary care and reasonable speed, and the fright and shying of a gentle horse thereat, constitute events in the proper use of the highway calling for its maintenance in a safe condition, and the injury done to a traveler by its unsafe condition in connection with such an event, is one of those dangers to which travelers are exposed by defects in the highway and for which indemnity is provided when the danger ripens into actual damage. (Conn.) *Upton v. Town of Windham*, 197.

5. HIGHWAYS—Liability for Defects in—Proximate Cause.—If a frightened horse plunges from a defective highway and throws the occupant of a vehicle upon the dashboard thereof, causing a concussion of his brain, and the horse, after running a distance, overturns the vehicle, by which the occupant receives further injury, both injuries are to be deemed the result of one transaction arising and resulting from the defective condition of the highway. (Conn.) *Upton v. Town of Windham*, 197.

HOMESTEADS.

1. A HOMESTEAD Right Can be Secured Only by a substantial compliance with the provisions of the statute. (Idaho) *Burbank v. Kirby*, 260.

2. HOMESTEAD—Defective Acknowledgment.—If a married woman files a declaration of homestead upon community property, which is not acknowledged and certified as required by statute, a homestead is not created, and after an execution sale and a sheriff's deed thereunder, it is too late to ask for a reformation of the acknowledgment in an action by the grantor in such deed to recover possession of the property. (Idaho) *Burbank v. Kirby*, 260.

3. HOMESTEAD—Hotel Property.—Premises occupied as a hotel by a man and his family are subject to homestead declaration, if the only statutory limitations on the acquisition of homestead rights are residence and value. (Idaho) *Kiesel v. Clemens*, 278.

4. HOMESTEAD IN FLATS.—A homestead in a flat or apartment house is confined to the flat or apartment occupied as a residence, provided its value is equal to the homestead exemption. (Ill.) *Potter v. Clapp*, 322.

5. HOMESTEAD IN FLATS.—If a householder occupies a flat in a flat building or an apartment in an apartment house as his homestead, his residence is as much disconnected from the other flats or apartments located in the same building as though the portion thereof occupied by him were located upon a different lot or under a different roof. (Ill.) *Potter v. Clapp*, 322.

6. HOMESTEAD IN FLATS—Accounting for Surplus Rents.—If a widow remains in possession of a flat under an agreement with the heirs, that pending a settlement of their respective rights, she shall occupy the lower flat as her homestead, rent the upper flat and account therefor to the heirs, she may be held to such an accounting. (Ill.) *Potter v. Clapp*, 322.

See Husband and Wife, 7, 8.

HOMICIDE.

1. MURDER by Torture.—If the person accused was present and poured turpentine, or other inflammable liquid, upon the person of the deceased, and ignited with a match or otherwise, such liquid, thereby causing the death of the deceased, he is guilty of murder by torture. (Tex. Cr. Rep.) *Chapman v. State*, 874.

2. MURDER by Torture—Presence and Acts of Accused.—If a person accused of murder simply poured turpentine upon the person of the deceased with no intent that it should be set on fire to kill him and was merely present when someone else set fire to the deceased, but did not agree to adopt the unlawful act and intent either by words or action, the presence of the accused, together with the fact that he thus poured the turpentine, do not alone constitute him guilty of the murder resulting from the firing of the turpentine by another. To make him guilty he must in some way consent and to some degree co-operate, either by acts or words, in the real commission of the crime. (Tex. Cr. Rep.) *Chapman v. State*, 874.

3. MURDER—Second Degree—Malice.—If a person makes an assault upon another with either express or implied malice, with intent to kill, and, during the difficulty, is forced to kill a third person in defense of his life, the killing can be of no higher grade than murder in the second degree. (Tex. Cr. Rep.) *Honeycutt v. State*, 797.

4. MURDER—Degrees—Malice—Proof.—In order to constitute murder in the first degree, express malice must be affirmatively shown as against the person killed. (Tex. Cr. Rep.) *Honeycutt v. State*, 797.

5. MURDER IN SECOND DEGREE.—If an accused assaults one person under circumstances which would make a killing murder, and another person, not intended to be killed, is killed, either by accident or design, the killing is murder in the second degree, upon implied malice. (Tex. Cr. Rep.) *Honeycutt v. State*, 797.

6. HOMICIDE—Manslaughter.—If one person assaults another with no intention to kill and subsequently kills a third person in resisting an attack upon him by the latter with a deadly weapon, the killing is of no higher grade than manslaughter. (Tex. Cr. Rep.) *Honeycutt v. State*, 797.

7. MURDER—Instructions.—If a case stands out in relief as murder in the first degree, the court is justified in charging generally only on murder in that degree, but even in such a case, the court should charge on murder in the second degree, and when it does the accused cannot complain as the latter charge is in his favor. (Tex. Cr. Rep.) *Augustine v. State*, 765.

8. HOMICIDE—Manslaughter.—An Instruction on manslaughter is properly refused when there is no provocation, and nothing to reduce the crime to manslaughter. (Ky.) *Jolly v. Commonwealth*, 429.

9. HOMICIDE, Trial for — Prejudicial Error.—The Appellate Court will not say, where the death penalty has been imposed, that the substantial rights of the accused were not prejudiced by instructions leaving out a ground of defense. (Ky.) *Jolly v. Commonwealth*, 429.

10. HOMICIDE—Malice Aforethought.—The Words “with malice” denote a wrongful act done intentionally, without just cause, and the term “aforethought” means a predetermination to do the act, however sudden, or recently framed in the mind, before the act is done. (Ky.) *Jolly v. Commonwealth*, 429.

11. **MURDER—Evidence of Intent.**—On a trial for murder by burning the deceased, evidence that shortly prior to the commission of the crime, the codefendant and partner of the accused, in the saloon where the crime was committed, took a piece of grass rope from under his apron and threw it behind the bar, where it was found two days after the commission of the crime, is admissible to show a malevolent intent on the part of the accused and of his codefendant. (Tex. Cr. Rep.) *Chapman v. State*, 874.

12. **MURDER—Evidence of Intent.**—On a trial for murder by burning the deceased, evidence to show that a small bottle which smelled like it had chloroform in it was found soon after the commission of the crime in the saloon of the accused where the crime was committed is admissible to show his malevolent intent and that the deceased was stupefied by some character of fluid. (Tex. Cr. Rep.) *Chapman v. State*, 874.

13. **MURDER—Evidence of Motive.**—If, on trial for murder, it appears that the deceased was robbed before he was murdered it is competent to show that immediately after the crime the accused had money on his person, although such money is not identified as having belonged to the deceased. (Tex. Cr. Rep.) *Chapman v. State*, 874.

14. **CRIMINAL LAW—Self-defense.**—The right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act, unheralded and unaccompanied by any demonstration, verbal or otherwise, indicative of the wrongful purpose. (Tex. Cr. Rep.) *Cook v. State*, 854.

15. **MURDER — Self-defense — Provoking Difficulty.**—If self-defense is set up against a charge of murder, it is error to instruct the jury upon the law of "provoking the difficulty," when there is no evidence of provocation. (Tex. Cr. Rep.) *Cook v. State*, 854.

16. **MURDER.**—Failure to Charge on Circumstantial Evidence is not error when the evidence shows the killing, and the accused's participation therein by positive testimony. (Tex. Cr. Rep.) *Augustine v. State*, 765.

17. **MURDER—Conspiracy—Charge.**—If the evidence in a murder case suggests a conspiracy, it is not error for the court to fail to charge as to that if the charge given on principals is sufficiently comprehensive. (Tex. Cr. Rep.) *Augustine v. State*, 765.

HUSBAND AND WIFE.

1. **GIFT TO WIFE as Her Separate Estate.**—A gift of money by a husband to his wife, as between them or their privies in blood or estate, is her separate estate, when no rights of creditors are involved. (Mo.) *Johnson v. Johnson*, 486.

2. **MARRIED WOMEN—Separate Property—Conversion of—Liability for.**—If a draft in payment for a married woman's separate property is made payable to a third person for her use, and is by him, without her consent, assigned to her husband's partner and upon the husband's order, without consideration, is credited to him and used in the partnership business, both he and his partner, are liable to her for the money as had and received for her use. (Ind. App.) *Comer v. Hayworth*, 335.

3. **MARRIED WOMEN—Estoppel.**—If a married woman, knowing of a deed purporting to contain a release of her dower and to be signed by her, within three years after its execution, fails to notify the grantee in her supposed deed or any of his grantees that she did not sign such deed as appears of record, and permits them to

suppose that such signature is genuine, she is not estopped, as against them, to set up the fact that her supposed deed is fraudulent. (R. I.) *Hunt v. Reilly*, 707.

4. ESTATES BY THE ENTIRETY May be Created in Personal as well as in real property, in Missouri, and between husband and wife as well as between strangers. (Mo.) *Johnson v. Johnson*, 486.

5. ESTATE BY ENTIRETY not Created When Wife Furnishes Part of Purchase Money.—An estate by the entirety does not arise, nor does the right of survivorship exist, where land is purchased by a man without his wife's express written consent, partly with his and partly with her money, but she will be decreed a resulting trust in the land in the proportion that her money bears to the total purchase price. And the same rule obtains where her separate money is so invested in personal property. (Mo.) *Johnson v. Johnson*, 486.

6. ESTATE BY ENTIRETIES not Created When Husband and Wife Loan Money and Take Deed of Trust.—An estate by the entirety is not created when a husband and wife each advance part of a loan and take a note secured by a deed of trust, but each is entitled to his or her proportionate share in the note and deed; and if he buys in the property at the trustee's sale, and his bid is credited on the note, her heirs are entitled to the same interest in the land that they had in the note and mortgage. (Mo.) *Johnson v. Johnson*, 486.

7. HOMESTEADS on Public Lands—Community Property.—If the equitable title to a homestead is vested in the community, and the legal title is not obtained until after the death of one of the spouses, the legal title then vests in the community and the heirs of the deceased spouse are entitled to one-half thereof. (Wash.) *Ahern v. Ahern*, 912.

8. COMMUNITY PROPERTY.—If an Inchoate Title to Land has its inception during the existence of the community, the legal title acquired by a surviving spouse after the dissolution of the community by death vests in the community, and the whole becomes community property. (Wash.) *Ahern v. Ahern*, 912.

See Acknowledgments, 2, 3; Adverse Possession, 4-10; Dower; Mortgage, 3; Principal and Surety, 10, 11.

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IMPRISONMENT.

See Criminal Law, 31.

INDICTMENT.

1. **INDICTMENT—Date of Crime.**—The failure of an indictment to set out the particular date upon which the crime alleged was committed renders it fatally defective. (Tex. Cr. Rep.) *Barnes v. State*, 801.
2. **INDICTMENT—Date of Crime.**—An indictment, although it sufficiently alleges that the accused did commit the crime charged, is fatally defective if it fails to set out some particular date when the crime was committed. (Tex. Cr. Rep.) *Barnes v. State*, 801.

See Criminal Law, 15, 16; Grand Jury.

INFANTS.

1. **INFANT—Misrepresentation as to Age—Estoppel to Disaffirm Deed.**—If an infant, by a deed reciting the purpose for which it is made, conveys land to make his grantee acceptable to the court as a surety on a bail bond, but before doing so testifies that he is of age, he is estopped, on reaching his majority, to disaffirm the conveyance, and one to whom he transfers the land in his attempt to disaffirm takes it at the risk of his right to do so. (Ky.) *Damron v. Commonwealth*, 453.
2. **INFANCY—Liability for Attorney's Fees.**—If a suit is brought by an infant through her father as next friend, and she confers with counsel, appears as a witness, and profits by the prosecution of the suit, a promise may be implied by her to pay attorney fees for conducting the suit. (R. I.) *Crafts v. Carr*, 721.
3. **INFANT'S LIABILITY for Attorney's Fees.**—Attorney fees may be recovered against an infant as necessities when the services rendered by counsel affect the infant's personal relief, protection, or liberty, or when they are necessary and financially beneficial to the infant's estate. (R. I.) *Crafts v. Carr*, 721.
4. **INFANT'S LIABILITY for Attorney Fees.**—Attorney's fees in prosecuting for an infant an action to recover damages for an indecent assault upon her are necessities, and may be recovered from her. (R. I.) *Crafts v. Carr*, 721.
5. **INFANT'S LIABILITY for Attorney Fees.**—A father is not bound to provide his infant daughter with counsel fees to prosecute an action for damages for an indecent assault upon her, and if she promises to pay such fees she is bound therefor as for necessities. (R. I.) *Crafts v. Carr*, 721.

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INHERITANCE TAX.

See Taxation.

INJUNCTIONS.

1. EQUITY—Spying on Business, When will not be Enjoined.—The watching of a wholesale druggist's place of business for the purpose of ascertaining what other druggists furnish him with patent or proprietary medicines, in violation of a contract fixing the terms at which such medicines shall be sold and the prices for which they may afterward be retailed, will not be enjoined. (N. Y.) Park etc. Co. v. National etc. Druggists' Assn., 578.

2. EQUITY JURISDICTION Over Political Rights.—Courts of chancery have no jurisdiction to grant an injunction to protect a person in the enjoyment of a political right or to assist him in acquiring such right. (Ill.) People v. Barrett, 296.

See Nuisance, 2; Officers, 1.

INSANITY.

See Criminal Law, 8, 9.

INSTRUCTIONS.

See Trial.

INSURANCE.

1. INSURANCE is a contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils. (Ohio St.) State v. Pittsburg etc. Ry. Co., 635.

2, 3. INSURANCE—Fire—Blanket Policy.—The very essence of a blanket policy of fire insurance is that it invariably attaches to and covers to its full amount every item of property described in it. If the loss upon one item exhausts the full amount of the policy, the whole insurance must be paid and there can be no apportionment of it. (Conn.) Schmaelzle v. London etc. Fire Ins. Co., 233.

4. INSURANCE—Fire—"Blanket" and "Specific" Policies—Apportionment of Loss.—In apportioning the loss upon property covered by "blanket" policies and "specific" policies, all of which provide that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policies must be regarded as insuring each item to the entire amount unappropri-

ated when it is reached, and the loss must be adjusted by dividing the whole property into items corresponding to those in the specific policies for the purpose of taking the items in the order of the greatest loss, then in computing the amount of insurance upon the first item, apply the full amount of the blanket insurance, and in computing the subsequent items, follow the same procedure, save that the total amount of insurance be reduced by the amount of blanket insurance already exhausted upon former items, and the amount of insurance under any given blanket policy, be likewise reduced by the amount thereof used in prior adjustments. (Conn.) *Schmaelzle v. London etc. Fire Ins. Co.*, 233.

5. INSURANCE, LIFE—Guaranty, Application of to Keep Policy Alive.—The guaranty fund provided for in a renewable term policy of life insurance without re-examination must be construed the same as a reserve fund in an ordinary life insurance policy, within the meaning of the New York statute. The spirit of the statute requires a broad meaning to be given to it for the benefit of the insured. (Cal.) *Nielsen v. Provident Sav. etc. Soc.*, 146.

6. INSURANCE.—The Statute of New York must be Considered as a Part of a Contract of Life Insurance when the policy is issued by a corporation organized under its laws. (Cal.) *Nielsen v. Provident Sav. etc. Soc.*, 146.

7. INSURANCE, LIFE—Agreement or Application, When not Required to Keep Policy in Force.—When a policy of life insurance stipulates that the reserve shall be applied as shall have been agreed in the application, either to continue the insurance or purchase a paid-up policy, and neither the application nor the policy contains any agreement with reference to the application of the reserve, the assured must, nevertheless, be given the benefit of the reserve, or surplus, by having it applied upon an extension or a reinsurance, instead of having it returned to him, and on his death, without any application or agreement on his part, the right to recover the insurance cannot be successfully resisted on the ground that he did not exercise his option of having the reserve applied for the purpose of keeping the policy in force. (Cal.) *Nielsen v. Provident Sav. etc. Soc.*, 146.

8. INSURANCE, LIFE—Demand and Surrender of Policy for the Purpose of Having the Reserve Applied to Continue the Insurance.—Under a statute providing that the reserve on a policy shall, on demand, with a surrender of the policy within six months after a lapse, be taken as a single premium of life insurance, and be applied to continue the reserve or to purchase paid-up insurance on the same life, it is not necessary that the demand and surrender be made before the death of the assured. The demand may be made after his death by the beneficiary. (Cal.) *Nielsen v. Provident Sav. etc. Soc.*, 146.

9. INSURANCE, LIFE—Waiver of the Surrender of the Policy.—Conceding that the beneficiary of a life insurance policy should have offered to surrender it as a condition precedent to having the reserve applied in continuation of the policy, such condition is waived if the insurer, immediately after the death of the insured, denies and disclaims all liability under and by virtue of the policy, and informs the beneficiary that it will not pay the amount named in the policy, or any part thereof. (Cal.) *Nielsen v. Provident Sav. etc. Soc.*, 146.

10. INSURANCE—Life and Accident Insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injury by accident or death from any cause not excepted in the contract. (Ohio St.) *State v. Pittsburg etc. Ry. Co.*, 635.

11. INSURANCE, Life and Accident—Relief Department of a Railway does not Contract for.—The relief department of a railway corporation which admits none but its employes on their application, and which requires the applicant to constitute an agent of the corporation as his agent, to apply as a voluntary contribution to the relief fund, from his wages according to the rate of wages earned, as graded in the regulations for the purpose of securing the benefits provided for in such regulations for a member of the "relief fund," and "additional death benefit" stating his class, and name of the beneficiary in case of death, the applicant agreeing that the acceptance of benefits from the relief fund shall operate as a release of all claims for damages against the corporation arising from his injury or death, does not carry on the business of insurance. (Ohio St.) *State v. Pittsburg etc. Ry. Co.*, 635.

12. INSURANCE, LIFE—Evidence.—The falsity of answers in an application for life insurance may be shown under the general issue. (R. I.) *Leonard v. State Mutual Life Assur. Co.*, 698.

13. INSURANCE, Life—Medical Examiner as Agent for Insurer. If a life insurance company requires its medical examiner to put the questions and fill out the answers in an application in his own handwriting, he becomes the agent of the company in this respect, and if he receives correct answers and takes the signature of the applicant before such answers are recorded, this must be regarded as the action of the insurer, and not within the rule that the writer of the application is the agent of the insured. (R. I.) *Leonard v. State Mutual Life Assur. Co.*, 698.

14. INSURANCE, Life—Medical Examiner as Agent.—A medical examiner of an insurance company required by it to fill out medical certificates is not the agent of the company for anything more than such certificates. Notice to him of anything not called for by his certificate is not notice to the insurer, and he has no authority to waive an answer or give advice binding on the insurer to write an answer as it is written in the application for insurance. (R. I.) *Leonard v. State Mutual Life Assur. Co.*, 698.

15. INSURANCE, LIFE—Warranties.—The answers of an applicant for life insurance are warranties, and their falsity and not his fraud is the basis of liability thereon. (R. I.) *Leonard v. State Mutual Life Assur. Co.*, 698.

16. INSURANCE, Mutual, Canceling of by the Insolvency of the Insuring Corporation.—Where an insolvency occurs while policies are outstanding in a mutual fire insurance company, the action of the court in adjudging such insolvency, granting an injunction, and appointing a receiver operates to cancel all existing policies in such company. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

17. INSURANCE CORPORATIONS.—A Member of a Mutual Insurance Corporation Must be Regarded as in a Similar Position to that of stockholders in such an association. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

See Benefit Societies.

INSURRECTION.

MARTIAL LAW—Declaring Without an Application from Local Officers.—If county officers fail in their duty to apply to the governor to proclaim the county in a state of insurrection and re-

bellion, he may issue such proclamation without their application. (Idaho) *In re Boyle*, 286.

See Habeas Corpus.

INTERSTATE COMMERCE.

See Commerce.

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Interstate Commerce, license taxes on peddlers, when interfere with, 845-852.

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INTEREST.

See Trover and Conversion.

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—Sales—Recovery of Price.—Mere knowledge on the part of the seller of intoxicating liquor that the purchaser intends to sell it in violation of law, together with the fact that it is so sold, does not constitute a participation in the unlawful act so as to prevent the seller from recovering the price of the liquor. (Ala.) *McWhorter v. Bluthenthal*, 43.

JEWELRY.

See Executors and Administrators, 1.

JOINT TENANCY.

1. JOINT TENANCY in Personal Property.—At the common law joint tenancies, with the incident of survivorship, obtains as to both real and personal property. (Mo.) *Johnson v. Johnson*, 486.

2. JOINT TENANCY.—As to Real Property, in Missouri, a grant or devise to two or more persons will be held to be a tenancy in common, unless by the terms of the grant or devise it is expressly declared to be a joint tenancy, except as to grants and devises to executors, trustees or husband and wife. (Mo.) *Johnson v. Johnson*, 486.

JOINT TORT-FEASORS.

See Torts.

JUDGES.

JUDGMENTS—Effect if Void.—A judgment in a case in which the trial judge is disqualified is void and will not sustain a plea of former jeopardy, or entitle an accused to bail. (Tex. Cr. Rep.) *Ex parte Graham*, 884.

JUDGMENTS.

1. DECREE Affecting Lands in Another State.—A decree of a court of equity, affecting title to real property in another state, will be given force there, if the court had jurisdiction of the parties. (Idaho) *Idaho Gold Min. Co. v. Winchell*, 290.

2. JUDGMENT—Reversal of—Effect of upon a Sale.—Except where the rights of third persons have intervened, the successful party upon an appeal may have the proceedings or sale vacated, either by motion in the court below, if the remittitur has been sent down, or by an independent action in any court of competent jurisdiction. He may also, in a proper case, have an action for damages as an alternative. (Cal.) *Cowdrey v. London etc. Bank*, 115.

3. JUDGMENT—Reversal of—Effect of upon a Sale Where the Judgment was Erroneous Only as to Its Amount.—Where, on an appeal from a judgment foreclosing a mortgage, the appellate court finds that the amount of the decree was greater than plaintiff was entitled to, and therefore orders that the judgment be reversed, with directions to the trial court to enter judgment in accordance with the views expressed by the appellate court, the appellant is entitled to have vacated the sale of his property made under the judgment, though the amount for which it was sold is less than the amount for which the plaintiff in the action is entitled to judgment in accordance with such views. (Cal.) *Cowdrey v. London etc. Bank*, 115.

4. JUDGMENTS AND ORDERS—Entry of.—A *Nunc Pro Tunc* Order cannot be made for the purpose of declaring that something was done which was not done. Its only office is to cause the record to show something done which was actually done, but which, through misprison or neglect, was not entered at the time in the record. (Cal.) *Cowdrey v. London etc. Bank*, 115.

5. JUDGMENT—Reversal of—Effect upon Deficiency Judgment.—Where a judgment in foreclosure is appealed from, and, after a sale made thereunder, is reversed, a deficiency judgment which was entered after such sale is vacated by the reversal. An order purporting to modify the deficiency judgment made by the trial court after such reversal is an order modifying something not in existence, and is therefore wholly inoperative. (Cal.) *Cowdrey v. London etc. Bank*, 115.

6. JUDGMENT REVERSED—Power of the Trial Court to Re-vive or Give Effect to.—When a judgment has been reversed, with directions to the trial court to enter judgment in accordance with the views expressed by the appellate court, the former cannot, by any new order or judgment which it may enter, make it relate back to, and preserve validity in, the original judgment, which had been vacated by the reversal. (Cal.) *Cowdrey v. London etc. Bank*, 115.

7. JUDGMENT—Reversal of—Right of Appellant to Rents of Property.—If, under a judgment foreclosing a mortgage which includes real property and its rents, issues, and profits, a sale is made to the mortgagee for less than the amount of the mortgage debt, under which he takes and holds possession and collects the rents, issues and profits, and the judgment is subsequently reversed because entered for too great a sum, he is not liable in an action to recover the property for the amount so collected, because, under his mortgage, he is entitled to such rents, issues and profits for the purpose of applying them to the satisfaction of his debt. (Cal.) *Cowdrey v. London etc. Bank*, 115.

8. JUDGMENT—Relief from Because of the Neglect of an Attorney.—A statute authorizing the court to relieve from a judgment taken against a party through his mistake, inadvertence, surprise or excusable neglect authorizes the granting of such relief when the mistake, inadvertence, surprise or neglect was that of the party's attorney. (Cal.) *O'Brien v. Leach*, 105.

9. JUDGMENT—Relief from, Discretion of the Court.—The supreme court will rarely interfere with the action of the lower court in granting relief from a judgment taken through the mistake, inadvertence, surprise or excusable neglect of the party or his attorney. The appellate court looks with favor on the action of the lower court in setting aside the judgment, and gives to it a favorable construction of the evidence. (Cal.) *O'Brien v. Leach*, 105.

10. JUDGMENT—Relief from, Because of an Inadvertence or Mistake.—Where defendant resides in a county other than that in which the action was commenced, and his attorney, acting under a mistaken impression that the client was served with process in the county of his residence, fails to answer within the time specified where the party is served in the county in which suit is brought, and judgment by default is taken, the action of the trial court in relieving from such judgment on motion will be sustained. (Cal.) *O'Brien v. Leach*, 105.

11. JUDGMENTS—Satisfaction of—Vacating Because of Irregularity in the Proceedings Concerning the Sale.—If an execution is void because not signed by the clerk in office at the time of its issuing, and the judgment is satisfied by a sale thereunder, void because of such irregularity, the satisfaction thus produced may be set aside and the judgment revived on motion, under a statute declaring that if the purchaser of property or his successor in interest fails to recover possession in consequence of irregularity in the proceedings concerning the sale, the court may revive the judgment for the amount by the purchaser at the sale with interest. (Cal.) *Merguire v. O'Donnell*, 91.

12. JUDGMENT—Satisfaction of—Construction of Statute Authorizing Proceedings to Set Aside and to Revive the Judgment.—A statute providing that when the purchaser at an execution sale fails to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property was not subject to execution, the court may set aside the satisfaction and revive the judgment for the amount paid by the purchaser, is remedial in its character, and should be liberally construed. (Cal.) *Merguire v. O'Donnell*, 91.

13. JUDGMENT—Satisfaction of—Statute of Limitations Against Proceeding to Vacate.—Under a statute authorizing proceedings to revive a judgment and to set aside its apparent satisfaction if the purchaser fails to recover possession in consequence of irregularity in the proceedings concerning the sale, the statute of limitations does not begin to run against the remedy thereby given until the purchaser fails to recover possession or until the action to recover the property is finally determined against him. This remedy is not an action upon a judgment, and hence is not controlled by the statute of limitations applicable to such actions. (Cal.) *Merguire v. O'Donnell*, 91.

See Appeal and Error, 6-9; Judges; Criminal Law, 33; Torts.

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 - reversal of, effect of is to restore appellant to the position in which he was before the judgment was pronounced, 128.
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 - reversal of, effect of upon judgments which are based upon the reversed judgment, 130, 131.
 - reversal of, effect of upon other judgments or decrees in the same action or suit, 132.
 - reversal of, enforcing restitution after by proceedings in the appellate court, 142.
 - reversal of, entitles the appellant to a new trial, 128, 129.
 - reversal of, estoppel of judgment is destroyed by, 132.
 - reversal of, extends to every part or provision of the judgment, 127.
 - reversal of, garnishment proceedings, effect of upon, 132.
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 - reversal of, parties not served with the notice of appeal are not affected by, 127.
 - reversal of, payment of the reversed judgment is not a defense to the further prosecution of the action, 143.
 - reversal of, places parties where they were before the error was committed, 128.
 - reversal of, possession taken by third persons, when must be surrendered after, 135.

- Judgments, reversal of, possession taken under the reversed judgment by a party must be surrendered after, 135.**
- reversal of, purchases made after the taking of the appeal, effect of upon, 134.
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- reversal of, restitution where the judgment is erroneous only as to its amount, 126.
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- reversal of, title is not divested by except at the election of the appellant, 141.
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JUDICIAL NOTICE.

See Evidence, 1, 2.

JUDICIAL SALES.

JUDICIAL SALES.—Inadequacy of Consideration for a purchase at judicial sale does not affect the good faith of the purchaser. (Iowa) *Koch v. West*, 394.

See Judgments, 3.

JURISDICTION.

See Courts; Divorce; Executors and Administrators, 19; Process; United States.

JURY.

1. **JURY TRIAL—Right to.**—The Guaranty in the Constitution of Idaho that the right of trial by jury shall remain inviolate is not intended to extend the right but simply to secure it as it existed at the date of the adoption of the constitution. (Idaho) Christensen v. Hollingsworth, 256.

2. **JURY TRIAL—Right to, in Equity Cases.**—A constitutional guaranty that the right to trial by jury shall remain inviolate has no reference to equity cases. (Idaho) Christensen v. Hollingsworth, 256.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Option to Extend Term.**—If a lease provides that the tenant may have, at his option, an extension, for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term constitutes an election to hold for the additional or extended term. (Iowa) Andrews v. Marshall Creamery Co., 412.

2. **LANDLORD AND TENANT—Distinction Between "Privilege of Extension" and "Right of Renewal."**—There is a broad distinction between a right of extension for a specified time and a right of renewal. Under the first provision a mere holding over constitutes an election to hold for the extended term, but a mere holding over is not a sufficient election to renew the lease. To constitute a renewal, some additional affirmative act or acts must be shown to establish the exercise of the right. (Iowa) Andrews v. Marshall Creamery Co., 412.

3. **LANDLORD AND TENANT—Right to Renew Lease—Holding Over.**—The mere act of a tenant in holding over after the expiration of his term is not sufficient, without proof of some other affirmative act on his part, to show an election to renew the lease for an additional term under a stipulation in the lease giving the privilege of such renewal. (Iowa) Andrews v. Marshall Creamery Co., 412.

4. **LANDLORD AND TENANT—Holding Over—Right of Renewal—Tenant at Will.**—A tenant merely holding over after the expiration of his lease containing a clause giving him a right of renewal, without doing any act evidencing an intention to renew the lease, is a mere tenant at will. (Iowa) Andrews v. Marshall Creamery Co., 412.

5. **LANDLORD AND TENANT—Renewal of Lease by Implication.**—If a tenant holds over after the expiration of his term under a lease giving him the right of renewal, and requests a renewal of the lease, and is assured by the authorized agent of the lessor that such renewal will be granted, this is a sufficient election to exercise the option to renew the lease as will bind the tenant. (Iowa) Andrews v. Marshall Creamery Co., 412.

See Fixtures, 4-6; Gas, 3.

LARCENY.

1. **LARCENY.**—To Constitute Larceny, there must be a simultaneous combination of unlawful taking, asportation, and felonious intent. (Ky.) *Cooper v. Commonwealth*, 426.

2. **LARCENY by Retaining an Overpayment.**—If a bank, by mistake in making change, makes an overpayment, the person receiving and thereafter converting it is not guilty of larceny, unless he entertained a felonious intent at the time of the payment. (Ky.) *Cooper v. Commonwealth*, 426.

LEASES.

See Landlord and Tenant.

LICENSE.

1. **PEDDLERS AND DRUMMERS—License Tax.**—One person may be both a peddler and a drummer at the same time, and although he is a drummer as to some of the methods adopted by him in doing business, yet he is liable for a license tax imposed by the state, if as to his other methods of conducting the same business he is a peddler and not a drummer. (Tex. Cr. Rep.) *Saulsbury v. State*, 837.

2. **CONSTITUTIONAL LAW—Occupation Taxes.**—A statute imposing an occupation tax upon cotton, wool, or hide buyers, but exempting from its operation merchants who pay a different occupation tax, is unconstitutional and void, as not being equal and uniform taxation. (Tex. Cr. Rep.) *Rainey v. State*, 786.

See Commerce.

LICENSEE.

See Negligence, 1-4.

LIENS.

1. **LIEN ON MINE** Where Owner has been Ousted.—If one unlawfully ousts the owner from a mining claim, and in operating it creates debts, they are not legal claims for liens against the property. (Idaho) *Idaho Gold Min. Co. v. Winchell*, 290.

2. **LIEN—Estoppel to Assert, by Claiming Purchase Money.**—If one claims a lien on property for the payment of a debt, and, upon the property being sold on a contract made prior to the creation of the debt, goes into a court of equity and asks to have his lien claim paid out of the purchase money, he is estopped from thereafter resorting to the property to make the debt. (Idaho) *Idaho Gold Min. Co. v. Winchell*, 290.

LIMITATION OF ACTIONS.

1. **LIMITATIONS, Statute of.**—When an Amended Pleading introduces a Cause of Action, the statute of limitations runs until the making of the amendment. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

2. **LIMITATIONS.**—The Legislature may Shorten the Statutory Period in which actions are to be prosecuted, yet, as to the shortened

period fixed, a statute can be operative only after the passage of the act. (Mo.) *Tice v. Fleming*, 479.

See Adverse Possession; Corporations, 16-20; Executors and Administrators, 6-10; Judgments, 13; Trusts, 4.

Note.

Limitations, Statute of, against suits to enforce the liability of officers of corporations, 989-996.

against suits to enforce subscriptions to the stock of corporations, 983-988.

in suits against stockholders, 974-983.

LIS PENDENS.

LIS PENDENS is Notice to Those Only who attempt to acquire some interest in the subject matter of a litigation after suit is begun, and from a party thereto. (Iowa) *Noyes v. Crawford*, 363.

LOGGING.

See Waters and Watercourses, 1.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION—Probable Cause—Burden of Proof.—Mere discharge of a person from a criminal charge without a hearing upon the merits, while sufficient to make out a prima facie case of want of probable cause, does not throw the burden of proving probable cause upon the defendant in an action for malicious prosecution. (Wash.) *Noblett v. Bartsch*, 886.

2. MALICIOUS PROSECUTION—Partner's Liability.—A partner as such is not liable for a malicious prosecution instituted by his copartner unless committed in the course of, and for the purpose of transacting, the partnership business. (Wash.) *Noblett v. Bartsch*, 886.

3. MALICIOUS PROSECUTION—Liability of Partner.—A prosecution for larceny is not within the scope of the business of a mercantile partnership, and there is no presumption of participation therein by all of the partners, so as to charge them all for a malicious prosecution without proof of the participation of all of them therein. (Wash.) *Noblett v. Bartsch*, 886.

MANDAMUS.

1. MANDAMUS to Compel Performance of Public Duty.—In a proceeding for mandamus to compel public officers to perform a public duty it is not necessary that the entire public join in the complaint as they may speak or interfere through one citizen alone. (Ill.) *People v. Harris*, 304.

2. MANDAMUS to Prevent Obstruction of Street—Parties.—It is prima facie the duty of the mayor and city council to keep the streets free from all obstructions for the benefit of the public, and the performance of such duty may be compelled by any citizen by writ of mandamus without showing that he has any legal interest in the action. (Ill.) *People v. Harris*, 304.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

1. MARRIAGE.—Cohabitation Meretricious in Its Inception is presumed to continue such until proved to have become matrimonial by direct or circumstantial evidence or by a subsequent lawful marriage between the parties. (Ill.) *Potter v. Clapp*, 322.

2. MARRIAGE—When Void.—Marriage between parties when either has a lawful wife or husband living is absolutely void. (Ill.) *Potter v. Clapp*, 322.

3. MARRIAGE—Attack upon—Burden of Proof.—A second marriage being shown as a fact, a strong presumption is raised in favor of its legality, which is not overcome by mere proof of a prior marriage, and that the first wife has not obtained a divorce. The party attacking the second marriage has the burden of proof to show that neither party thereto has obtained a divorce. (Ill.) *Potter v. Clapp*, 322.

4. MARRIAGE—Validity—Res Judicata.—If heirs contest the widow's allowance upon the ground that she was not lawfully married to their father, an award of such allowance is a finding in favor of the validity of such marriage and binding upon the heirs until reversed in a direct proceeding. (Ill.) *Potter v. Clapp*, 322.

5. ILLEGAL MARRIAGE—Communication of Venereal Disease. If a woman, whose divorce from her husband is invalid, marries another man, who inoculates her with a venereal disease, she has no right of action against him therefor, he having practiced no deception in inducing her to marry him. (Idaho) *Deeds v. Strode*, 263.

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MARRIED WOMAN.

See Husband and Wife.

MARTIAL LAW.

See Insurrection.

MASTER AND SERVANT.

1. MASTER AND SERVANT—Assumption of Risks.—An employé who, knowing and appreciating a danger, voluntarily assumes the risk, thereby exempts his master from liability for injury, although the employer is primarily responsible for the existence of such danger. (Iowa) *Martin v. Chicago Ry. Co.*, 371.

2. MASTER AND SERVANT—Assumption of Risks as between master and servant is the same, whether they arise from the violation of a common-law duty, or an obligation imposed by statute. (Iowa) *Martin v. Chicago etc. Ry. Co.*, 371.

3. MASTER AND SERVANT—Negligence—Assumption of Risk. If a railroad employé who has assumed the risks incident to the ordinary speed of a train sues for an injury alleged to have been caused by an excessive rate of speed, he must prove in order to recover, not only an excessive rate of speed constituting negligence, but also that it was the operating cause of the injury. (Iowa) *Martin v. Chicago etc. Ry. Co.*, 371.

4. MASTER AND SERVANT—Tests of Liability.—If a servant departs from his employment, his master is not answerable. The rule is otherwise when he departs from, or neglects, a duty in the line of his employment. (Wis.) *Euting v. Chicago etc. Ry. Co.*, 936.

5. MASTER'S LIABILITY for Act of Servant Outside His Duty.—A servant cannot bind his master to respond in damages to a third person, unless the act of the servant which caused the injury was expressly, or by necessary implication, within the line of his duty under his employment. (N. J. L.) *Holler v. Ross*, 546.

6. MASTER'S LIABILITY for Willful Act of Servant.—The liability of a master for the willful, wrongful and malicious acts of his servant extends to every case where the act is done with a view to the furtherance and discharge of the master's business and within the scope of the employment. (N. J. L.) *Holler v. Ross*, 546.

6a. MASTER'S LIABILITY for Willful Act Outside Servant's Duty.—Where it appears, when the plaintiff rests his case in an action against a master for injuries caused by his servant, that the act of the servant was willful, and was not, expressly or impliedly within the line of his duty or employment, there should be a nonsuit. (N. J. L.) *Holler v. Ross*, 546.

7. MASTER'S LIABILITY When Watchman Shoots Trespasser. One employed to watch the personal property of a company, stored upon the real property of another, does not act within the line of his duty if he shoots a person trespassing upon the realty, because the trespasser, when commanded, refuses to go off the premises or to halt or throw up his hands. (N. J. L.) *Holler v. Ross*, 546.

8. MASTER AND SERVANT—Negligence—What Questions may be Considered in Actions for.—In an action to recover of a railway

corporation for injuries conceded to have been suffered by the plaintiff from the negligence of defendant's employes, not authorized or ratified by it, the only questions for consideration by the jury are what is the nature of the plaintiff's injuries and what sum of money will compensate him for his loss. (Wis.) Rueping v. Chicago etc. Ry. Co., 1013.

9. MASTER AND SERVANT—Punitive or Exemplary Damages for Unauthorized Acts or Neglects of Servants.—A master is not liable for punitive or exemplary damages for injuries wrongfully inflicted by his servants upon another without proof that he directed the wrongful act to be done or subsequently ratified it, and in the absence of such authorization or ratification, the degree of negligence, as to whether ordinary or gross, has no proper place in the controversy as a measure of the plaintiff's right to redress, and should not be submitted to the jury. (Wis.) Rueping v. Chicago etc. Ry. Co., 1013.

See Railroads.

MILITIA.

See Insurrection.

MINES AND MINERALS.

See Adverse Possession, 3; Ejectment, 1.

MINORS.

See Infants.

MISTAKE.

See Equity.

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Mistake of Law, relief from judgments because of, 110, 111.

MONOPOLIES AND TRUSTS.

1. MONOPOLIES AND TRUSTS—Agent's Statements as Evidence of.—Statements made by solicitors taking orders from retail butchers, and by managers of "coolers" where dressed meat is kept, are admissible in evidence to show that their principals are members of a combination to fix the price of meat. (Mo.) State v. Armour Packing Co., 515.

2. MONOPOLIES AND TRUSTS—What Evidence Establishes.—Evidence that corporations engaged in the same place in the same line of business bill goods at the same price, allow rebates, give notice of an advance of rates at a certain date, always followed by a rise, call in competitors to obtain a concession to sell old goods at a reduced rate, gather up papers of competitors showing that they have been selling below a certain price, and discontinue all this when the legality thereof is called in question by the state—is sufficient to establish an unlawful combination to fix prices. (Mo.) State v. Armour Packing Co., 515.

3. MONOPOLIES AND TRUSTS—It is no Defense to a combination to fix prices among corporations furnishing dressed meat to retail butchers, that it has benefited the commonwealth by en-

couraging stock-raising, giving employment to many people, and putting in circulation vast amounts of money; or that its suppression will injure the stock-raising industry; or that the home companies will suffer if their franchises are taken away; or that the retailers are worse in their practices than the combine; or that the trust, in one city, was never effective because not lived up to by some of its members. (Mo.) *State v. Armour Packing Co.*, 515.

4. MONOPOLIES AND TRUSTS—Validity of.—Combinations to fix and maintain the price of necessities are void at the common law, and statutes prohibiting them are constitutional. (Mo.) *State v. Armour Packing Co.*, 515.

5. MONOPOLIES AND TRUSTS—Punishment.—The character of the punishment to be imposed, where corporations combine to fix prices, rests in the discretion of the court. A judgment of absolute ouster is not imperative, but justice may be satisfied by the payment of a fine and costs. (Mo.) *State v. Armour Packing Co.*, 515.

6. PLEADING—What Allegations of a Complaint may be Regarded as Conclusions of Law.—Where a complaint seeking an injunction alleges specifically the acts of the defendants, and follows this allegation with a statement that the defendants are combining and conspiring to obtain exclusive control of the wholesale and jobbing trade as between manufacturer and retailer, and to regulate and control the methods by which such trade shall be carried on, and to control the price and discounts, this must be regarded as a statement of the conclusions of law which the pleader attributes to the facts he has stated, and hence is not admitted by a demurrer. (N. Y.) *Park etc. Co. v. National etc. Druggists' Assn.*, 578.

7. RESTRAINT OF TRADE or Forbidden Monopoly—What is not.—An agreement between wholesale druggists and manufacturers of proprietary or patent medicines, fixing the price at which sales shall be made to such druggists and the prices at which they may sell to their customers, and excluding from the right to purchase such medicines at such prices all wholesale druggists who do not maintain the retail prices so fixed, does not create a forbidden monopoly, and is not unlawful as in restraint of trade, where all persons have a right to make purchases at such prices who agree in their sales to maintain such retail rates. (N. Y.) *Park etc. Co. v. National Druggists' etc. Assn.*, 578.

8. RESTRAINT OF TRADE.—The Proprietors of Proprietary or Patent Medicines have the Right to specify the price at which such articles shall be sold, and to require all dealers who purchase of them to maintain the prices specified. (N. Y.) *Park etc. Co. v. National etc. Druggists' Assn.*, 578.

9. PLEADING—Threats of Intimidation.—An allegation that at a meeting of the druggists' association a committee on proprietary goods reported that, with a few exceptions, the proprietors of all the prominent proprietary medicines had adopted the contract or rebate plan for the sale of their goods, and that the committee recommended that continued and untiring opposition be shown to the sale of articles of those proprietors who did not adopt such plan, or withdraw from it, does not show threats or unlawful intimidation on the part of the association. (N. Y.) *Park etc. Co. v. National etc. Druggists' Assn.*, 578.

MORTGAGES.

1. A MORTGAGE Purporting to Include Both the Land and the Rents, Profits, and Issues Thereof entitles the mortgagee, upon fore-

closure, upon a proper showing of the insufficiency of the premises to pay the debt and expenses, to have a receiver appointed to take possession, collect the rents accruing during the pendency of the suit, and apply them to the debt, or if lawfully in possession without such appointment, to take such rents and profits while so in possession and apply them upon his mortgage debt. (Cal.) *Cowdery v. London etc. Bank*, 115.

2. MORTGAGE Securing Debt Due to a Third Person—Satisfaction of, When Void.—If a mortgage shows on its face that it in part secures an obligation due to a third person, the satisfaction of such mortgage by the mortgagee without the payment of such obligation is void. The record of the mortgage is sufficient to bring home to all persons the interest of such third person. (Wis.) *Tweeddale v. Tweeddale*, 1003.

3. MARRIED WOMEN—Reformation of Mortgage.—A mistake in the description of land intended to be mortgaged by a married woman may be corrected on a proper showing. (Idaho) *Christensen v. Hollingsworth*, 256.

4. A MORTGAGE may be Reformed and Foreclosed in the same action. (Idaho) *Christensen v. Hollingsworth*, 256.

See Chattel Mortgages; Judgments, 3-5.

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Mortgage of Chattels, breach of condition of entitled mortgagee to possession, 684.

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Mortgage of Chattels, title of the mortgagor, whether terminates on condition broken, 683, 684.
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 trover by mortgagee for property subject to, 691.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—Obstruction to Streets—Damages—Evidence.—An abutting owner who sues for injury to his business arising from an unreasonable closing of a street, is properly limited to a period of three months after the street is reopened, in showing the difference in profits between the times when the street was closed and when it was open. (Wash.) *Lund v. St. Paul etc. Ry. Co.*, 906.

2. MUNICIPAL CORPORATIONS—Obstruction of Street—Evidence.—Defendant, in an action to recover for an obstruction to a street for an unreasonable time in making an improvement, is entitled to show under a general denial, the condition of the coal and steel markets at the time for the purpose of showing that the delay in obtaining material with which to complete the improvement was caused by circumstances over which he had no control. (Wash.) *Lund v. St. Paul etc. Ry. Co.*, 906.

3. MUNICIPAL CORPORATIONS—Obstruction of Streets—Nuisance.—The closing of a street by one to whom a municipal corporation has delegated the right to close it for the purpose of making an improvement therein does not constitute a nuisance, so long as reasonable care and diligence are exercised in prosecuting the work. (Wash.) *Lund v. St. Paul etc. Ry. Co.*, 906.

4. MUNICIPAL CORPORATIONS—Liability for Obstructing Streets.—Unavoidable delay in the construction of a street improvement caused by inability to procure necessary material ordered from the best equipped plant in the country whose delay in filling the order is caused by strikes and labor troubles, does not render the person who has undertaken to construct the improvement liable for the continued obstruction of the street, in the absence of a showing that such material could have been obtained at an earlier date from some other source. (Wash.) *Lund v. St. Paul etc. Ry. Co.*, 906.

5. MUNICIPAL CORPORATIONS—Obstruction of Street—Liability.—A corporation or person to whom a municipal corporation has delegated the right to close a street for the purpose of making an improvement therein is liable for damages arising from closing the street only when the city would be thus liable. (Wash.) *Lund v. St. Paul etc. Ry. Co.*, 906.

6. MUNICIPAL CORPORATIONS.—Streets in Their Entirety are public properties exclusively for public use, and no part of them can be devoted exclusively to private purposes or private use by virtue of municipal ordinances or otherwise. (Ill.) *People v. Harris*, 304.

7. MUNICIPAL CORPORATIONS—Ordinance Permitting Encroachment on Street.—An ordinance permitting the construction of a bay window extending into the street, or any other encroachment thereon, for a purely private purpose or private use is void. (Ill.) *People v. Harris*, 304.

8. CONSTITUTIONAL LAW.—The Fourteenth Amendment of the Constitution of the United States is not violated by a municipal ordinance restricting the right to erect and maintain gasworks in

a city to the territory named in the ordinance. (Cal.) *Dobbins v. Los Angeles*, 95.

9. CONSTITUTIONAL LAW—Police Power—What Municipal Ordinances are Within.—An ordinance obviously foreign to any recognized purpose of the police power and interfering with the ordinary enjoyment of property would, no doubt, be held invalid, but where an ordinance is reasonably within a proper consideration of and care for the public health, safety or comfort, the court will not disturb the legislative act, nor substitute its own views of what is proper in the premises for those of the legislative body. (Cal.) *Dobbins v. Los Angeles*, 95.

10. MUNICIPAL CORPORATIONS—Police Power.—An Ordinance Limiting the Right to Erect and Maintain Gasworks to the territory named in the ordinance is a legitimate exercise of the police power. (Cal.) *Dobbins v. Los Angeles*, 95.

11. MUNICIPAL CORPORATIONS.—The Motives Which Induced the Enactment of a Municipal Ordinance cannot be considered in a judicial proceeding questioning its validity. (Cal.) *Dobbins v. Los Angeles*, 95.

12. MUNICIPAL ORDINANCES—Application of to Buildings Already Erected.—An ordinance forbidding the manufacture and sale of gas within specified limits applies to gasworks in the process of construction when it was enacted. (Cal.) *Dobbins v. Los Angeles*, 95.

13. MUNICIPAL CORPORATIONS—Police Regulation—Estoppel to Enforce.—A permit issued by a municipal corporation authorizing the erection of gasworks on a designated lot cannot estop the municipality from subsequently enacting and enforcing an ordinance forbidding the erection and maintenance of such works within a designated part of the city in which is included the same lot. (Cal.) *Dobbins v. Los Angeles*, 95.

14. MUNICIPAL ORDINANCE—When Citizen has no Action for Breach of.—If the provisions of an ordinance are intended, not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, a breach thereof is remediable only at the instance of the municipality or by enforcement of the penalty prescribed therein, and there is no right of action in an individual citizen especially injured in consequence of the breach. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

See Highways; Mandamus, 2.

Note.

Municipal Corporations, salaries of officers of, whether subject to garnishment, 452.

MURDER.

See Homicide.

MUTUAL BENEFIT SOCIETIES.

See Benefit Societies.

NAVIGABLE WATERS.

See Waters and Watercourses, 1.

NEGLIGENCE.

1. NEGLIGENCE TOWARD CHILDREN — Explosives.—The placing of dynamite upon a vacant lot, insufficiently covered and in such position as to be readily discovered and easily tampered with by, and to form an object of attraction to, children accustomed to play upon or pass over such lot is negligence which may cause responsibility for injury to such children from such explosive. (Wash.) *Nelson v. McLellan*, 902.

2. NEGLIGENCE—Infant Licensees.—A mere naked license or permission to minors to enter or pass over land does not create a duty or obligation on the part of the owner or occupant to provide against danger from accident. He owes to such licensee no duty as to the condition of the premises, save that he shall not knowingly let him run upon a hidden peril or willfully cause him harm. (R. I.) *Paolino v. McKendall*, 736.

3. NEGLIGENCE—Infant Trespassers or Licensees.—Although an owner or occupant of land has knowledge that children of tender years are in the habit of going thereon to play he is under no duty or obligation to guard them from injury caused by fire set by him to consume waste materials. (R. I.) *Paolino v. McKendall*, 736.

4. NEGLIGENCE—Duty Imposed by Statute or Ordinance.—It is immaterial, in respect to making its violation actionable, whether a duty is imposed by the common law, by a statute, or by an ordinance. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

5. NEGLIGENCE—Public Duty, Private Action for Breach of.—Where a duty is due to the public, considered as composed of individuals, and is for their protection, each person specially injured is entitled to a private action for his damages. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

6. NEGLIGENCE may be Proximate Cause of an injury of which it is not the sole or immediate cause. It is enough for it to be the efficient cause which set in motion the chain of circumstances leading up thereto. (Ind. App.) *Cincinnati etc. R. R. Co. v. Worthington*, 355.

7. NEGLIGENCE—Contributory.—Drunkenness never excuses a person for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Drunkenness does not exempt a person from responsibility for contributory negligence. (Ala.) *Nash v. Southern Ry. Co.*, 19.

8. CONTRIBUTORY NEGLIGENCE is a Matter of Defense, the onus of proving which is on the defendant, except when the plaintiff's evidence relieves the former from discharging it. (Ala.) *Nash v. Southern Ry. Co.*, 19.

9. NEGLIGENCE—Contributory as Bar to Recovery.—To defeat a right to recover for negligence on the ground of contributory negligence it must in some manner or degree have contributed to the injury complained of. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

10. NEGLIGENCE—Question for Jury.—It is error to withdraw from the jury any question of negligence alleged, and which the evidence tends to establish. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

11. NEGLIGENCE—Question for Jury.—In determining question of negligence and contributory negligence, the jury must be allowed to consider all the facts and circumstances bearing upon the question, and not select one particular prominent fact as controlling the

case to the exclusion of all others. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

12. NEGLIGENCE—Question for Jury.—If the evidence is conflicting as to the distance from a crossing at which a railroad whistle was sounded, that question must be left to the jury to determine. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

13. NEGLIGENCE—Pleading.—If, the facts alleged are sufficient to show negligence, it is sufficiently pleaded, although the acts complained of are not specifically alleged to be negligent. (Ind. App.) *Cincinnati etc. R. R. Co. v. Worthington*, 355.

14. NEGLIGENCE—Evidence to Show that Negligence was Gross, When Inadmissible and Prejudicial.—Evidence of gross negligence where there can be no punitive damages as a matter of law or damages for mental suffering caused otherwise than by physical injury is irrelevant, and is liable to be prejudicial where, in the very nature of things, it is patent that there was no mental suffering induced by insult to be compensated for. (Wis.) *Rueping v. Chicago etc. Ry. Co.*, 1013.

15. EVIDENCE of Gross Negligence—Admission of—When Prejudicial.—The admission of evidence of gross negligence on the part of defendant's servants may be prejudicial and entitle it to a new trial, though the jury finds that such gross negligence did not exist, if counsel for the plaintiff persistently contends before the jury that the defendant was guilty of criminal negligence, and that mere compensation to the plaintiff for his loss would be inadequate to the enormity of the defendant's fault, and the jury is appealed to to fix punitive damages, having regard to the ability of the defendant to respond, and the verdict is for a sum so large as to indicate that the jury must have regarded the case as one in which more than compensatory damages might be awarded. (Wis.) *Rueping v. Chicago etc. Ry. Co.*, 1013.

16. NEGLIGENCE.—Evidence of precautions against further accidents taken after an accident is not competent to show antecedent negligence. (R. I.) *McGarr v. National etc. Worsted Mills*, 749.

See Death; Gas; Parent and Child; Railroads.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. NEW TRIAL—Extension of Time to File Evidence.—If a third extension of time within which to file a statement of evidence on motion for a new trial is duly granted by the trial court, it will be presumed to be within the time of a former extension as required by statute, although the latter extension is not on file. (R. I.) *Crafts v. Carr*, 721.

2. NEW TRIAL.—Extension of Time for Filing Evidence on motion for a new trial is inclusive of the day to which such extension is granted. (R. I.) *Crafts v. Carr*, 721.

NOTARY PUBLIC.

See Acknowledgments.

NUISANCE.

1. NUISANCE—Ouster—Easement.—The erection and maintenance of a structure projecting over the land of another is an invasion of his legal rights, which, if continued long enough under a claim of right, may ripen into an easement, but it is not an ouster of possession. (Conn.) *Norwalk Heating etc. Co. v. Vernam*, 246.

2. NUISANCE—Injunction to Remove.—The erection of a structure projecting over the land of another is a nuisance which the latter may himself remove or apply for a mandatory injunction against its further wrongful continuance, and the absence of a direct assertion of right by the person maintaining such structure is not a bar to the right to such injunction. (Conn.) *Norwalk Heating etc. Co. v. Vernam*, 246.

See *Municipal Corporations*.

NUNC PRO TUNC.

See *Judgments*, 4.

OBSTRUCTING JUSTICE.

1. RESISTING AN OFFICER—Validity of Writ as Defense.—If a writ in a civil suit is issued by a court of competent jurisdiction and is fair on its face, it is no defense for resisting an officer in the execution of such writ that it is merely informal and voidable and might be quashed in a civil proceeding. (Tex. Cr. Rep.) *Witherspoon v. State*, 812.

2. RESISTING AN OFFICER—Validity of Writ Question of Law. On a prosecution for resisting an officer in the execution of a writ issued in a civil suit, the validity and legal effect of such writ are questions of law for the court, and not of fact for the jury. (Tex. Cr. Rep.) *Witherspoon v. State*, 812.

3. RESISTING AN OFFICER—Writ as Evidence.—On a prosecution for resisting an officer in the execution of a writ issued in a civil suit, the writ is admissible in evidence notwithstanding objections to its validity in regard to merely formal matters, which might be good on a motion to quash in a civil suit. (Tex. Cr. Rep.) *Witherspoon v. State*, 812.

4. RESISTING AN OFFICER—Evidence.—If an officer is resisted in the execution of civil process and subsequently procures a warrant for the arrest of the person resisting, evidence of his acts and declarations at the time of his arrest are not admissible on his trial for resisting the officer in the execution of the civil process. Such matters relate to a separate and distinct offense. (Tex. Cr. Rep.) *Witherspoon v. State*, 812.

5. RESISTING AN OFFICER—Evidence.—On a prosecution for resisting an officer in the execution of civil process not invalid on its face, but simply voidable in a civil proceeding, evidence of its invalidity is not admissible. (Tex. Cr. Rep.) *Witherspoon v. State*, 812.

OFFICERS.

1. PUBLIC OFFICERS—Injunction to Protect.—The right of an officer de jure to hold an office is not a property right which a court of chancery can protect by injunction. (Ill.) *People v. Barrett*, 296.

2. OFFICER DE FACTO—Assault upon.—A statute making an assault on an officer engaged in the discharge of his duty an offense refers to and includes officers de facto as well as de jure. (Tex. Cr. Rep.) *Brown v. State*, 806.

3. OFFICERS DE FACTO—What Constitutes.—A person who has received a valid appointment from a sheriff as his deputy and has entered upon the discharge of the duties of such deputy, but has failed to conform to the requirements of the statute of taking the oath of office, or filing his commission for record, is an officer de facto. (Tex. Cr. Rep.) *Brown v. State*, 806.

4. OFFICER'S SALARY—Subjecting to Debts.—Under a constitutional provision that no officer except the governor shall be allowed over five thousand dollars compensation per annum, public policy demands that the courts refuse to require any officer to set apart any portion of his salary for the payment of his debts. (Ky.) *Dickinson v. Johnson*, 434.

5. OFFICER'S SALARY.—The Assignment by an officer of the fees and emoluments of his office in the future is void and against public policy. (Ky.) *Dickinson v. Johnson*, 434.

6. OFFICER'S SALARY not Exempt When Invested in Land.—An officer's fees or salary is not, when invested in real estate, exempt from the antecedent debts. (Ky.) *Dickinson v. Johnson*, 434.

See Obstructing Justice.

OPTION.

See Landlord and Tenant, 1-4; Vendor and Vendee, 1, 2.

OWELTY.

See Partition.

PARENT AND CHILD.

1. PARENT'S LIABILITY for Child's Negligent Use of Gun.—If a father permits his minor son to use a loaded rifle when he knows, or should know, that, from age or mental weakness, or the use of intoxicants, the boy is incompetent to be intrusted therewith, he is answerable to a person injured by the discharge of the gun. (Ky.) *Meers v. McDowell*, 475.

2. PARENT'S RIGHT OF ACTION for Injury to Child.—For a negligent injury to his infant son, a father may maintain an action for the injury to him from the loss of the son's services, and for expenses incurred by him in consequence of the son's injury. (Ky.) *Meers v. McDowell*, 475.

3. PARENT AND CHILD—Negligence—Loss of Service.—A widow who supports her minor child and controls its earnings is entitled to recover for the loss of its services caused by an injury negligently inflicted by a third person. (R. I.) *McGarr v. National etc. Worsted Mills*, 749.

4. PARENT AND CHILD—Right of Mother to Recover for Loss of Services of Child.—If it is agreed between the parents that the mother shall maintain, control, and receive the earnings of their minor child she is entitled to maintain an action for the loss of services of such child prior to the death of the father. (R. I.) *McGarr v. National etc. Worsted Mills*, 749.

5. NEGLIGENCE—Injury to Child—Measure of Damages.—In an action by a parent to recover for an injury to his minor child caused by negligence, the measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority, together with necessary costs and expenses incident to its care and cure, less its support and maintenance. No recovery can be had for the loss of the comfort and society of the child, nor for the physical or mental suffering of the parent caused by reason of the injury to the child. (R. I.) *McGarr v. National etc. Worsted Mills*, 749.

PARTITION.

1. PARTITION—Owelty.—The general powers of a court of equity are broad enough to require a payment of owelty unlimited by a statute providing for a sale of an estate in partition, but applying only to those cases where the division cannot be exact. (R. I.) *Udike v. Adams*, 711.

2. PARTITION—Owelty.—To permit a payment of owelty, the court must be satisfied that it is equitably necessary, that the amount is fair, and that its payment is not so imposed upon a party as to be unreasonably burdensome. (R. I.) *Udike v. Adams*, 711.

3. PARTITION—Owelty—Payment of.—If a person is unable to make payment of owelty at the time of division, it should be made a charge or lien upon his share of the property and a reasonable time given for payment. (R. I.) *Udike v. Adams*, 711.

See Shipping.

PARTNERSHIP.

1. PARTNERSHIP, Goodwill of.—The Firm Name is Inseparable from the Goodwill and just as much an asset of the firm as the goodwill itself. (N. Y.) *Slater v. Slater*, 605.

2. PARTNERSHIP.—Though a Firm Name Consists of the Names of the Two Partners, the right to continue its use is a firm asset, and does not, on the death of one, inure to the benefit of the survivor. (N. Y.) *Slater v. Slater*, 605.

3. PARTNERSHIP—Sale of Assets Including the Goodwill—Firm Name.—A purchaser at a sale of the partnership assets, including the goodwill, has the right to continue the use of the firm name, though it consists of the name of the two members, one of whom has died, and such purchaser, whether he be the surviving partner or not, acquires the right to continue to use the firm name upon complying with the provisions of the statute. (N. Y.) *Slater v. Slater*, 605.

See Malicious Prosecution, 2, 3.

Note.

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PASSENGERS.

See Carriers; Constitutional Law, 11-13.

PAYMENT.**1. PAYMENT—Extension of Time of Without Consideration.—**

A promise to extend the time of payment of an obligation does not bind the principal, if made without consideration. (Cal.) Stroud v. Thomas, 111.

2. PAYMENT—Application of.—

If a creditor has two claims one past due and the other not, a payment made by the debtor without direction or agreement as to its application, must be applied to the debt past due. (Ala.) McWhorter v. Bluthenthal, 43.

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Payments, application of, as between partnership and individual obligation, 52.

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See Commerce; License.

PERJURY.

PERJURY in Taking an Oath Required by the Laws of Another State.—Under a section of a penal code declaring that a person who swears that any affidavit or other writing by him subscribed is true on any occasion on which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of justice, and who, on such occasion, willfully and knowingly deposes falsely in any material matter, or states in his affidavit any material matter to be true which he knows to be false, is guilty of perjury, a person may be convicted of perjury if the oath taken by him was one permitted or required by the laws of another state. (N. Y.) *People v. Martin*, 628.

PHYSICAL EXAMINATION.

See Criminal Law, 33.

PLACE OF TRIAL.

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PLEADING AND PRACTICE.

1. PLEADING.—A Demurrer Admits the facts alleged, but not the conclusions of law. (N. Y.) *Park etc. Co. v. National Drug-gists' Assn.*, 578.

2. PRACTICE—Joint Demurrer Where the Complaint is Good as to Some of the Defendants.—A joint general demurrer to a complaint for insufficiency in behalf of several defendants is bad if the complaint states a cause of action against any of them. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

3. PRACTICE—Demurrer on the Ground of Misjoinder of Causes of Action.—It is only when a complaint states two or more causes of action that a demurrer lies for misjoinder, and not where an unsuccessful attempt is made to state a second cause. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

4. PRACTICE—Misjoinder of Causes of Action.—An amended complaint which alleges a cause of action in favor of the creditors of a corporation and another cause of action in favor of a receiver who has been appointed in the action is subject to demurrer for misjoinder of causes of action. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

POLICE POWER.

See Constitutional Law; Municipal Corporations, 8-13.

PRINCIPAL AND SURETY.

1. SURETY—Effect of His Signing Note After Delivery.—A surety on a note cannot escape liability on the ground that he signed the instrument after it was delivered, when the payee did not accept it until so signed. (Ky.) *Deposit Bank of Sulphur v. Peak*, 466.

2. A SURETY Who Signs After the Execution of the Note by His Principals and without any additional consideration for his becoming a surety is ordinarily not liable. (Cal.) *Stroud v. Thomas*, 111.

3. SURETY SIGNING NOTE After Execution, But in Pursuance of Previous Agreement.—If a surety signs a note after its execution by the principal debtors, but in pursuance of a pre-existing agreement between them and the creditor that they would procure the signing of such surety if he would accept the note in satisfaction of a prior indebtedness, the execution of the note by the surety under such circumstances relates back to, and takes effect, as if it had been coincident with the execution by the principal debtors. (Cal.) *Stroud v. Thomas*, 111.

4. SURETY—Not Discharged by Adding Another Surety.—A surety on a note is not discharged by the addition before delivery, without his knowledge, of another name as surety where such note was executed for the purpose of borrowing money thereon. (Ky.) *Brey v. Hagan*, 464.

5. SURETY—Extension of Time of Payment—When Will be Deemed Without Consideration and Insufficient to Release Surety.—An agreement after the maturity of a note in consideration of the payment of a part of the principal or of overdue interest, to extend the time for payment, is without consideration and does not release the surety, though the agreement is respected. (Cal.) *Stroud v. Thomas*, 111.

6. **SURETIES—Evidence of Relative Wealth of.**—If a father signs his son's note as surety, and after its delivery another surety signs it, the admission of evidence that the father is a wealthy man, while the other surety is comparatively poor, is prejudicial error, in an action to enforce the latter's liability. (Ky.) *Deposit Bank of Sulphur v. Peak*, 466.

7. **SURETIES.—The Only Liability as Between Cosureties** is to divide, in proportion to their original liability, any indemnity received by their suretyship, and any damage necessarily sustained by it. (Ky.) *Deposit Bank of Sulphur v. Peak*, 466.

8. **SURETY, Payment of Liability by**—When does not Affect Cosurety.—A surety on a note about whose liability, as between him and the payee, there is some question may, without legal objection from another surety, pay what would be his own part of the liability, is no wise interfering with the original liability of his cosurety. (Ky.) *Deposit Bank of Sulphur v. Peak*, 466.

9. **SURETY—Indemnity to as Affecting Cosurety.**—If the payee of a note, upon the payment by one of the two sureties thereon of one-half of the amount for which he is legally bound, agrees in consideration of such payment—it being past due—to indemnify him against having any further sum to pay, the agreement is not binding for want of consideration, and his cosurety is not thereby affected. (Ky.) *Deposit Bank of Sulphur v. Peak*, 466.

10. **SURETYSHIP—Married Woman's Contract of.**—In Kentucky a married woman's estate cannot be subjected to the payment of a liability upon a contract to answer for the debt, default, or misdoing of another, including her husband, unless such estate has been set aside for that purpose by conveyance. (Ky.) *Tompkins v. Triplett*, 472.

11. **SURETYSHIP—Note Signed by Wife as Principal and Delivered by Husband.**—If a wife makes her husband agent to deliver a note signed by both, her signature appearing first, she is bound by his representation to the payee that she is principal. (Ky.) *Tompkins v. Triplett*, 472.

12. **SURETYSHIP—Parol Evidence that Obligor is Only Surety.**—An obligor may introduce parol evidence to show that he is only surety on a writing which is a joint and several obligation. (Ky.) *Tompkins v. Triplett*, 472.

See Bail.

PROBATE PROCEEDINGS.

See Executors and Administrators.

PROCESS.

1. **JURISDICTION.—When Service by Publication is relied upon,** the judgment-roll should show on its face that every act required by law has been substantially complied with, or the judgment is void. (Idaho) *Strode v. Strode*, 249.

2. **JURISDICTION—Service by Publication.**—A Court is not authorized to enter judgment, when service is by publication, until proof of a substantial compliance with the law as to publication and mailing of summons is made and filed with the clerk of court. (Idaho) *Strode v. Strode*, 249.

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See Husband and Wife, 7, 8.

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PUBLIC OFFICERS.

See Officers.

QUIETING TITLE.

EQUITY—Action to Quiet Title—Proof of Allegations.—The plaintiff in an action to quiet title must prove the title as alleged by him. (Iowa) Koch v. West, 394.

RAILROADS.

1. **RAILROADS**—Negligence—Proximate Cause.—If employes in charge of a railroad train negligently and wrongfully call a station at night, open the car doors, and stop the train at a point distant from the station, and a passenger, believing that the train has reached his destination at the station called, in attempting to alight, is suddenly jerked by the train and thrown violently to the ground, causing severe and permanent injury; the negligent calling of the station and the other events are but one transaction, and such negligence, and not the jerking of the train, is the proximate cause of the injury. (Ind. App.) Cincinnati etc. R. R. Co. v. Worthington, 355.

2. **RAILROADS**—Negligence—Presumption.—Stopping a train at an unusual place causing an injury to a passenger places the railroad company presumptively in the wrong, throwing the onus of explanation upon the company. (Ind. App.) Cincinnati etc. R. R. Co. v. Worthington, 355.

3. **RAILROADS**—Negligence—Drunken Trespasser.—A railroad company is not liable for injury to, or the death of, a drunken trespasser, injured by it while upon its track, in the absence of wantonness or willful wrong in injuring him. (Ala.) Nash v. Southern Ry. Co., 19.

4. **RAILWAYS**—Liability of for Act of Engineer.—If an engineer places a torpedo on the track, and, knowing that it is still there and that third persons are close by, moves his engine so that the wheel passes over and explodes the torpedo, his employer is answerable to a third person thereby injured. (Wis.) Euting v. Chicago etc. Ry. Co., 936.

5. RAILWAYS—Liability of for Acts of Employees.—A railway corporation which places torpedoes in the hands of its engineer, to be placed on the track in certain contingencies as warnings to approaching trains, is answerable for his placing one on the track for his own amusement, though this is an act not contemplated by his employer. (Wis.) *Euting v. Chicago etc. Ry. Co.*, 936.

6. RAILROAD TRACK—Negligence in Rescuing Person on.—If a train approaches when two persons are crossing a railroad bridge, and, as they are attempting to reach the other end, one falls between the ties, it is the legal right of the other to remain with and seek to rescue his companion, and in doing so he is not guilty of contributory negligence. (Ky.) *Becker v. Louisville etc. R. R. Co.*, 459.

7. RAILROAD TRACK—Duty to Trespasser on.—If the engineer on an approaching train sees a person on a railroad bridge, whose only means of escape is to reach the end of the bridge, he must give such person ample time to cross in safety. (Ky.) *Becker v. Louisville etc. R. R. Co.*, 459.

8. RAILROAD CROSSING.—The Cutting of a Train on a Side-track so that some cars are on one side and some on the other of the highway is not an invitation to the public to cross the other tracks without exercising reasonable care. (N. J. L.) *Passman v. West Jersey etc. R. R. Co.*, 573.

9. RAILROAD CROSSING.—The Absence of Statutory Signals, required to be given of the approach of trains, does not justify a traveler in assuming that it is safe for him to cross a railway track. (N. J. L.) *Passman v. West Jersey etc. R. R. Co.*, 573.

10. RAILROAD CROSSING.—One About to Cross a Railroad track on a highway is presumed to know the danger, and, while he may reasonably expect to be warned by the prescribed signals of an approaching train, he cannot justify himself in risking the danger, unless he has exercised his senses in the manner of an ordinarily prudent person. (N. J. L.) *Passman v. West Jersey etc. R. R. Co.*, 573.

11. RAILROAD CROSSING.—The Law Exacts of a Bicyclist, on approaching a railroad crossing where the view is in anyway obstructed, practically the same reasonable care as it does of a pedestrian. He should dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross. (N. J. L.) *Passman v. West Jersey etc. R. R. Co.*, 573.

12. RAILROADS—Negligence—Failure to Give Warning.—Even in the absence of statutory regulation, a railway company may be chargeable with negligence in failing to give reasonable warning before running its train over a public crossing. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

13. RAILROADS—Warnings at Crossings.—A statutory regulation fixing the minimum limit of distance within which a railroad must give warning upon approaching a crossing does not abrogate the common-law obligation requiring a warning at a greater distance, if, by reason of the speed of the train, or the peculiar dangers of the crossing, some earlier signal is dictated by reasonable caution. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

14. RAILROADS—Signals at Crossings.—Mere compliance with statutory requirements as to signals at crossings will not absolve railroad companies from any common-law duties which they are under, or excuse them from taking other reasonable precautionary

measures, when their trains are crossing, or about to cross, public crossings. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

15. RAILROADS—Duty at Crossings.—Allegations that the statutory warnings were not given at a crossing by a railroad train, and that no sufficient warning was given to enable an avoidance of the accident, are broad enough to permit the application of the rule that care by such railroad company at the crossing, to be reasonable must be proportionate to the existing danger. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

16. RAILROADS—Negligence—Rate of Speed.—Although a high rate of speed in the operation of a railroad train is not of itself negligence, yet it may become such at places of peculiar or extraordinary danger. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

17. RAILROADS—Speed of Trains.—Habitual violation of a municipal ordinance regulating the speed of trains does not relieve a railroad company from the imputation of negligence. (Iowa) *Martin v. Chicago etc. Ry. Co.*, 371.

18. RAILROADS—Speed of Trains.—The Benefit of Ordinances regulating the speed of railroad trains may be claimed by anyone coming within their protection. (Iowa) *Martin v. Chicago etc. Ry. Co.*, 371.

19. RAILROADS—Fellow-servants.—The Foreman of a Section Crew who directs the movements of his force and has charge and control of the handcar on which they are riding, is not a fellow-servant with the men, and if he negligently applies the brakes, throwing one of them from the car, the master is answerable. (Ky.) *Illinois Cent. R. R. Co. v. Josey*, 455.

20. RAILROADS—Contributory Negligence of Employee on Handcar.—If a section foreman negligently applies the brakes to a handcar on which he and his crew are riding, throwing one of the men from the car, it is no defense to an action against the company therefor that the man was standing up without any support, when the foreman could see his position, and know his peril if the car should be suddenly checked. (Ky.) *Illinois Cent. R. R. Co. v. Josey*, 455.

21. RAILROADS—Injury to Livestock from Fright—Burden of Proof.—A railroad company has a right to make required signals at a public crossing and all the usual noises incident to the running and moving of its trains, and the burden of proof is on one who seeks to recover for the death of a horse caused by fright at escaping steam from a railroad engine, to show that such emission of steam or the giving of a signal was unnecessary to a skillful operation of such engine. (Ala.) *Louisville etc. R. R. Co. v. Lee*, 24.

22. RAILWAY CORPORATIONS—Relief Department of—Ultra Vires.—The maintenance by a railway corporation of what is commonly known as a relief department for the benefit of its employes is not ultra vires, and it cannot, by a proceeding in quo warranto, be ousted from the further continuation of such maintenance. (Ohio St.) *State v. Pittsburg etc. Ry. Co.*, 635.

23. RAILWAYS—Public Policy—Relief Department.—The maintenance and management by a railway corporation of a relief department for the benefit of its employes is not against public policy. (Ohio St.) *State v. Pittsburg etc. Ry. Co.*, 635.

See Carriers; Street Railways.

Note.

Railways, passenger tickets, statutes restricting the sale of to agents of the carriers, 828-834.

RAPE.

1. **RAPE—Evidence—Illegal Acts in Another County.**—A person indicted in one county for rape upon a girl within the statutory age of consent committed within such county, cannot be convicted upon evidence alone of acts of illegal intercourse committed by the parties in another county or counties. (Tex. Cr. Rep.) *Manning v. State*, 873.

2. **RAPE—Evidence of Acts in Another Locality.**—On a trial for the rape of a girl within the statutory limit of the age of consent, evidence of acts of sexual intercourse between the parties committed in another county or state is admissible as tending to show an undue intimacy as existing between them. (Tex. Cr. Rep.) *Manning v. State*, 873.

3. **RAPE—Evidence.**—It is incompetent to prove that the mother of a prosecutrix for rape was keeping a house of prostitution at the time of the alleged crime. (Tex. Cr. Rep.) *Manning v. State*, 873.

4. **RAPE—Ignorance of Age of Prosecutrix.**—Want of knowledge of the age of the prosecutrix for rape, or an exercise of reasonable care to ascertain her age by the accused, is no defense for the rape of a female within the statutory age of consent. (Tex. Cr. Rep.) *Manning v. State*, 873.

5. **RAPE—Separate Acts of Intercourse—Election.**—If, on a trial for rape, several distinct acts of intercourse are proved, the prosecution must elect upon which it will rely for a conviction. Rape is not a continuous offense, and each act of intercourse may constitute a distinct crime. (Tex. Cr. Rep.) *Batchelor v. State*, 791.

6. **RAPE.—Assault with Intent to Commit rape** can be shown only by evidence of force or attempted force, and not by evidence of fraud alone. (Tex. Cr. Rep.) *Ford v. State*, 787.

7. **RAPE—Assault to Commit—Evidence.**—Under an indictment for an assault with intent to rape, conviction cannot be had upon evidence showing an attempt to rape by fraud alone. (Tex. Cr. Rep.) *Ford v. State*, 787.

8. **RAPE—Indictment—Judicial Knowledge.**—It is not essential to an indictment for rape brought in a county other than the one in which the crime was committed that it allege that the county of the prosecution is in the same judicial district as that in which the crime was committed, as the court will take judicial knowledge of that fact. (Tex. Cr. Rep.) *Mischer v. State*, 780.

See Venue, 2, 3.

REASONABLE DOUBT.

See Criminal Law, 22-29.

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See Criminal Law, 18-20.

RESISTING OFFICER.

See Obstructing Justice.

RESTRAINT OF TRADE.

See Monopolies and Trusts.

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See Trusts.

RETROACTIVE STATUTE.

See Constitutional Law, 9, 10.

REVENUE STAMPS.

See Forgery.

Note.

Reversal of Judgments. See Judgments.

RIGHT OF WAY.

See Easements.

SALES.

1. **SALES—Cash on Delivery.**—If goods are sold for cash on delivery, the payment and delivery are concurrent acts, and the title to the property does not pass without payment of the price, unless such payment is waived. (Ala.) *Drake v. Scott*, 25.

2. **SALES—Acceptance to Satisfy Statute of Frauds.**—The receipt or acceptance of goods, sold under an oral contract of sale, to satisfy the statute of frauds, involves the taking possession of them by the vendee, and while there may be an acceptance and actual receipt by the vendee pursuant to the sale, unaccompanied by a manual delivery, as where the vendee is already in possession, or the vendor retains the custody as bailee of the vendee, yet the proof in such cases must be clear and unequivocal and establish an actual change of the relation of the parties to the property. (Conn.) *Devine v. Warner*, 211.

3. **SALES—Acceptance to Satisfy Statute of Frauds.**—A receipt and acceptance of goods under an oral contract of sale, to satisfy the statute of frauds, implies a delivery; and there must be such a delivery by the vendor and receipt by the vendee of the goods sold, as shows an intention on the part of the parties to vest in the vendee the possession and right to possession discharged of all lien for the price. (Conn.) *Devine v. Warner*, 211.

4. **SALES—Acceptance to Satisfy Statute of Frauds.**—An acceptance of goods, sold under an oral contract of sale, to satisfy the statute of frauds requires more, by way of proof of receipt and acceptance, than mere words, indicative merely of the parties' assent to the agreement of sale, and it is not enough to satisfy the condition of acceptance that the title to the goods has merely become vested in the purchaser. (Conn.) *Devine v. Warner*, 211.

See Contracts, 4.

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Sales. See Frauds, Statute of.

SAVINGS BANKS.

See Banks and Banking, 7.

SELF-DEFENSE.

See Homicide, 14, 15.

SHIPPING.

1. **VESSELS—Jurisdiction of State Courts Over.**—A vessel is personal property, and the rights of its owners are proper subjects for consideration in the state courts in cases where the jurisdiction of the national courts in the exercise of their admiralty and maritime powers is not exclusive. When a subject is within the admiralty and maritime jurisdiction, such jurisdiction is not necessarily exclusive. (Wis.) *Reynolds v. Nielson*, 1000.

2. **VESSELS—Jurisdiction to Partition.**—State courts of equity have jurisdiction to entertain a suit by a part owner of a vessel to partition it by directing the sale and the division of the proceeds. (Wis.) *Reynolds v. Nielson*, 1000.

SOLDIERS' HOME.

See United States.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—Sufficiency of Title.—A purchaser will not be compelled to take a conveyance of land if there is a reasonable doubt about the title. There may be a good title at law which a court of equity will not force on an unwilling purchaser. (N. J. L.) *Meyer v. Madreperla*, 536.

2. SPECIFIC PERFORMANCE—Who Affected by Suit.—A suit for specific performance of a contract to convey land does not affect a prior bona fide purchaser under an unrecorded deed without notice of plaintiff's claim, who is not made a party to the suit. One who has a title which antedates the suit, but is not of record, and who is not made a party to the suit, is not bound by the *lis pendens*. (Iowa) *Noyes v. Crawford*, 363.

3. SPECIFIC PERFORMANCE—Conveyance Pendnetes Lite.—During the pendency of a suit for specific performance neither party to the action can alienate the property in dispute so as to affect the rights of his opponent. (Iowa) *Noyes v. Crawford*, 363.

4. VENDOR AND VENDEE—Specific Performance—Dower.—Where an option stipulates that, on payment of a sum specified, "we bind ourselves to convey, by good warranty deed and abstract of title from the organization of the county," and is signed by a married man, he is not bound to procure his wife's release of her inchoate right of dower, but only to make a conveyance executed by himself containing a covenant of general warranty and to furnish an abstract of title from the organization of the county. Hence, in a suit against him for specific performance, the court is not authorized to decree that he convey, allowing the vendee to retain so much of the purchase price as will protect his title against the right of dower. (Ohio St.) *People's Sav. Bank Co. v. Parisette*, 672.

STATUTE OF FRAUDS.

See Sales.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. CONSTITUTIONAL LAW—Title of Statute.—The title "An act to regulate the practice of barbering and licensing of persons to carry on such practice, and providing punishment for its violation," is broad enough to validly embrace provisions for the appointment of a board of examiners, defining their duties and compensation, and for the regulation of apprentices, and as to a license fee. (Wash.) *State v. Sharpless*, 893.

2. CONSTITUTIONAL LAW—Title of Act.—The title of "an act to define and punish murder by mob violence, to fix the venue and regulate proceedings in such cases, and to provide for the suspension and removal of sheriffs who permit it, and fix the venue and regulate proceedings in such cases," is not unconstitutional as embracing more

than one subject, nor does it attempt to create a new offense of murder. (Tex. Cr. Rep.) *Augustine v. State*, 765.

3. CONSTITUTIONAL LAW—Construction of Statutes.—If a statute is ambiguous, or susceptible of several different constructions, it is competent for the courts to study the history of the bill in its progress through the legislature by appealing to the legislative journals, in order to reach a correct interpretation of the meaning of the statute. (Tex. Cr. Rep.) *Augustine v. State*, 765.

4. CONSTITUTIONAL LAW.—Statutes Must be Capable of Intelligent Construction and interpretation, otherwise they are inoperative and void. (Tex. Cr. Rep.) *Augustine v. State*, 765.

5. CONSTITUTIONAL LAW—Construction of Statutes.—If a law is framed in indefinite or uncertain terms, the courts are authorized to appeal to all of the rules of construction in order to ascertain whether it is in such condition as to be enforced. (Tex. Cr. Rep.) *Augustine v. State*, 765.

6. CONSTITUTIONAL LAW — Interpretation of Statutes — Indefiniteness.—If a statute is so indefinitely framed, so uncertain in its terms, and of such doubtful construction that it cannot be understood or intelligently interpreted, either from the language in which it is expressed or from any written law, it must be declared inoperative and void. (Tex. Cr. Rep.) *Augustine v. State*, 765.

7. STATUTES OF OTHER STATES may be Proved and Taken into Consideration in any proper case, subject to the provisions of domestic statutes and of the constitution, though they have no absolute or exclusive force beyond the boundaries of the state which enacted them. This principle is based upon common and international law originating in the comity which exists between civilized nations and states, to which, as between the states of the Union, is added the force of the federal constitution. (N. Y.) *People v. Martin*, 628.

8. LAWS OF SISTER STATES.—The law of a sister state is presumed to be valid, and when proved should be recognized, unless forbidden by the laws of our own state or by its public policy, to be deduced from its general course of legislation and from the settled adjudications of its highest court. (N. Y.) *People v. Martin*, 628.

See Constitutional Law.

STENOGRAPHER'S FEES.

See Costs.

STREET RAILWAYS.

1. STREET RAILWAY'S Liability for Unsafe Street.—An ordinance requiring street railway companies to pave and keep in repair, under the direction of the municipal authorities, the part of the street adjacent to and between their tracks and rails, and providing that if they fail to do so the city may do the work and they shall pay the cost, gives no right of action against a company by a traveler injured through a defective pavement. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

2. STREET RAILWAYS—Requiring Them to Pave Street.—For a city to require street railway companies to pave and keep in repair, under the direction of the municipal authorities, the part of

the street adjacent to and between their tracks and rails, and to provide that if they fail to do so the city may perform the work and they shall pay the cost, is taxation, and is not supportable as an exercise of the police power. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

3. STREET RAILWAY'S Duty as to Condition of Tracks.—A railway company is bound by the common law, without either a specific statute or ordinance, or a contractual obligation, to lay its tracks in a public street in a proper manner, and to keep them in a proper state of repair. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

4. STREET RAILWAY—Burden Imposed as Condition to Franchise.—If some burden is imposed by a municipality upon a street railway company as a condition to the grant of its franchise, the acceptance of the condition constitutes a contract between the company and the city. (N. J. L.) *Fielders v. North Jersey St. Ry. Co.*, 552.

STREETS.

See Municipal Corporations; Vendor and Vendee, 7.

SUMMONS.

See Process.

SURETYSHIP.

See Principal and Surety.

SWINDLING.

See False Pretenses.

TAXATION.

1. TAXATION—Property Subject to.—Checks or Orders on the Treasury of the United States are subject to taxation as the solvent credits of the payee or holder. They are not exempt under the provisions of the Revised Statutes of the United States, providing that all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under any state, or municipal, or local authority. (Cal.) *Hibernia Sav. etc. Soc. v. San Francisco*, 100.

2. CONSTITUTIONAL LAW—Inheritance Taxes—Exemption of Residents of a State.—The amendment to the statute imposing inheritance taxes exempting therefrom nephews and nieces when residents of the state, is not in conflict with section 2 of article 4 of the constitution of the United States, but, by virtue of that section, the exemption must be accorded to nephews and nieces who are citizens of any of the sister states. (Cal.) *In re Estate of Johnson*, 161.

See Commerce; Constitutional Law, 3; Guardian and Ward; License.

TENANCY IN COMMON.

COTENANCY.—Possession of One Cotenant is presumed to be the possession of all, and does not become adverse to the other cotenants unless they are actually ousted, or unless the adverse char-

acter of the possession of the one is actually known to the others, or is so open and notorious in its hostility and exclusiveness as to put the other cotenants on notice of its adverse character. (Ala.) *Ashford v. Ashford*, 82.

See Joint Tenancy.

TICKETS.

See Constitutional Law, 11-13.

TITLE OF STATUTE.

See Statutes.

TORTS.

JUDGMENTS Against Joint Tort-feasors—Payment as Bar.—The voluntary payment to the clerk of court of a judgment against one of two joint tort-feasors sued separately, while it remains unaccepted by the plaintiff, does not bar an action against the other tort-feasor. (Iowa) *McDonald v. Nugen*, 407.

See United States.

TRESPASSERS.

See Negligence, 1-3; Railroads, 3-7.

TRIAL.

1. **TRIAL PRACTICE.**—If there is a palpable conflict in the evidence as to a material question in issue, an affirmative charge requested by defendant is properly refused. (Ala.) *McWhorter v. Bluthenthal*, 43.

2. **TRIAL PRACTICE—Defects in Proposed Instructions to Jurors.**—Though an instruction in the form requested is not intelligible, apparently from some omission, the court is under no duty to supply the omission or to otherwise make the charge intelligible, but may refuse to charge as requested. (Ala.) *McWhorter v. Bluthenthal*, 43.

3. **JURY TRIAL.**—Instructions Partly Typewritten and partly handwritten are not objectionable on that ground. (Iowa) *Kinyon v. Chicago etc. Ry. Co.*, 382.

4. **TRIAL.**—Instructions to the jury to ignore a statement of counsel as to certain facts creating a liability not in issue between the parties is not erroneous but proper. (Wash.) *Lund v. St. Paul etc. Ry. Co.*, 906.

5. **TRIAL—Objections and Exceptions to Evidence.**—If a proper objection to the admission of evidence is made and overruled and an exception taken, such objection and exception apply to subsequent errors of the same nature in the examination of the witness without a renewal thereof. (Wash.) *De Wald v. Ingle*, 927.

See Criminal Law.

TROVER IN CONVERSION.

1. **TROVER** Will not Lie for Money delivered to one person to be expended in behalf of another and by the former converted to his own use. (R. I.) *Larson v. Dawson*, 716.

2. CONVERSION—Interest—Equity.—The measure of damages in trover for the conversion of property includes interest on the current value of the property, and equity follows the law in the allowance of interest. (Ill.) *Smyth v. Stoddard*, 314.

Note.

Trover by a mortgagee for the property subject to his mortgage, 691.

TRUSTS.

1. PARTIES in Action to Enforce Resulting Trust.—If a husband and wife each advance part of a loan, taking a note secured by a deed of trust, and he buys at the trustee's sale, having the amount of his bid credited on the note, her heirs, and not her administrator, are the proper parties to bring an action to have their interests in the land established. (Mo.) *Johnson v. Johnson*, 486.

2. TRUSTS.—Resulting trusts arise by implication of law and cannot grow out of a contract to hold the title for a third person who advances the purchase money. (Ill.) *Potter v. Clapp*, 322.

3. TRUSTS.—Express trusts do not rest in parol, but must be evidenced by writing. (Ill.) *Potter v. Clapp*, 322.

4. LIMITATIONS, Statute of—Express Trust.—The statute of limitations has no application in the case of an express trust, where there has been no denial or repudiation of the trust. (Wis.) *Boyd v. Mutual Fire Assn.*, 948.

TRUSTS AND MONOPOLIES.

See Monopolies and Trusts.

UNITED STATES.

1. THE UNITED STATES has not Consented to be Sued for Its Torts. (Ohio St.) *Overholser v. National Home for Disabled Soldiers*, 658.

2. UNITED STATES—What Suits Deemed to be Against.—A suit against a public corporation having no other powers than the performance of a function of the government, and accomplishing no other object, is plainly a suit against the government and its property. (Ohio St.) *Overholser v. National Home for Disabled Soldiers*, 658.

3. JURISDICTION OF SUITS Against the United States.—No suit can be maintained against the United States or against its property in any court without the express authority of Congress. (Ohio St.) *Overholser v. National Home for Disabled Soldiers*, 658.

4. JURISDICTION.—An Action of Tort Cannot be Sustained Against "The National Home for Disabled Volunteer Soldiers," though it has power to take, hold, and convey real and personal property, and to sue and be sued in the courts of law and equity. Such an action is, in effect, against the United States, and it has not consented to be sued for torts. (Ohio St.) *Overholser v. National Home for Disabled Soldiers*, 658.

VENDOR AND VENDEE.

1. OPTIONS—Right to Withdraw From.—If an option to purchase real property is given for a good consideration, it cannot be withdrawn before the time specified for its continuance. (Wis.) *Mueller v. Nortmann*, 997.

2. OPTIONS—Death Does not Terminate.—If an option to purchase real property is given for a specified time on a good consideration, the death of the giver before the expiration of the time does not impair the right of the other party to thereafter make his election and do the other things necessary on his part, and thereupon to enforce performance against the heirs and representatives of the giver. (Wis.) *Mueller v. Nortmann*, 997.

3. VENDOR AND VENDEE—Stipulation that the Latter shall Hold as Tenant at Sufferance.—An agreement in a contract for the sale and purchase of land that in case of default in payments, the vendee shall hold the premises as tenant at sufferance of the vendor, does not change the relation of the parties to that of landlord and tenant after such default, nor otherwise forfeit the rights of the vendee. (Wis.) *Hill v. Sidie*, 1011.

4. VENDOR AND VENDEE—Good Title.—There is an Implied Agreement on the part of a vendor, in every contract for the sale of land, to make good title to the vendee. (N. J. L.) *Meyer v. Madreperla*, 536.

5. VENDOR AND VENDEE—Good Title at Law.—In actions at law the implied agreement for title in a contract for the sale of land will be satisfied by a good title at law, under the evidence adduced. (N. J. L.) *Meyer v. Madreperla*, 536.

6. VENDOR AND VENDEE.—A Want of Good Title is not Made Out by the vendee, in an action for breach of contract to convey, by showing that the conveyance tendered does not convey the title of a certain person to a small undivided share of the lands, when such person has been absent and unheard of since 1879, and can have no interest in the property unless he was alive in 1890. (N. J. L.) *Meyer v. Madreperla*, 536.

7. VENDOR AND PURCHASER—Streets—Estoppel to Deny.—If a grantor conveys land bounding it on a way or street, he and his heirs are estopped to deny that there is such a way or street. Such description is an implied covenant on the part of the grantor of the existence of such way or street and of the right of the grantee to its use. (Ala.) *Teasley v. Stanton*, 88.

See Specific Performance.

VENEREAL DISEASE.

See Marriage, 5.

VENUE.

1. TRIAL—Change of Venue.—A statute authorizing the judge to change the venue on his own motion leaves this matter entirely within his discretion, and it is not a matter to be controverted by evidence. (Tex. Cr. Rep.) *Augustine v. State*, 765.

2. CONSTITUTIONAL LAW—Venue in Rape.—A statute authorizing the prosecution of the offense of rape in some county other than the one in which the crime is committed, or in any county of the judicial district in which it is committed, is valid when not prohibited by some provision of the state or national constitution. (Tex. Cr. Rep.) *Mischer v. State*, 780.

3. RAPE—Allegations of Venue.—An indictment for rape may properly allege that it is presented by the grand jury of the county wherein the prosecution is instituted, and that the crime was com-

mitted in another county, naming it. (Tex. Cr. Rep.) *Mischer v. State*, 780.

See Constitutional Law, 5.

VESSELS.

See Shipping.

WATERS AND WATERCOURSES.

1. NAVIGABLE STREAMS—Use of the Banks in Logging.—The right to use a stream for navigation extends only to the bed thereof, and not to an appropriation, either permanently or temporarily, of the soil, trees, and vegetation on its banks, as where log booms are fastened across the stream and the banks are washed away by the accumulation of water and timber. (Ky.) *Smith v. Atkins*, 424.

2. ACCRETIONS, Title to.—If the Fractional North Half of a section bordering on a river is entirely washed away, making the south half the river front, accretions, thereafter formed against the south half, although they extend over and beyond the space where the fractional north half had been when the survey was made, belong to the owner of the south half. And the case is not altered by the fact that no patent for the north half was issued until after its reformation from the accretions to the south half. (Mo.) *Wid-decombe v. Chiles*, 507.

WEARING APPAREL.

See Executors and Administrators.

WEATHER BUREAU RECORDS.

See Evidence, 3.

WITNESSES.

1. EVIDENCE.—Statement of Conclusions of Fact by a witness is not admissible in evidence. (Ala.) *Ashford v. Ashford*, 82.

2. EVIDENCE.—Opinion of Amount of Damages.—Testimony of plaintiff as to the money value of his damages arising from a personal injury is inadmissible. (Wash.) *De Wald v. Ingle*, 927.

3. WITNESSES.—Death of One Party to Transaction.—When a cause of action is based on a note and deed of trust executed to a husband and wife, he cannot, after her death, testify in his own behalf. (Mo.) *Johnson v. Johnson*, 486.

4. WITNESSES.—Waiver of Objection to.—The right to object to the testimony of a witness, because the other party to the transaction is dead, is not waived, where the opposition only cross-examine him as to matters covered by his examination in chief. (Mo.) *Johnson v. Johnson*, 486.

5. WITNESSES.—Impeachment.—If reputation for chastity has a direct bearing upon the probability of the facts stated by the witness it may be proved for the purpose of impeachment. (Tex. Cr. Rep.) *Hudson v. State*, 789.

6. WITNESSES.—Impeachment.—A witness cannot be impeached by evidence that he is in the habit of associating with lewd and unchaste women. (Tex. Cr. Rep.) *Hudson v. State*, 789.

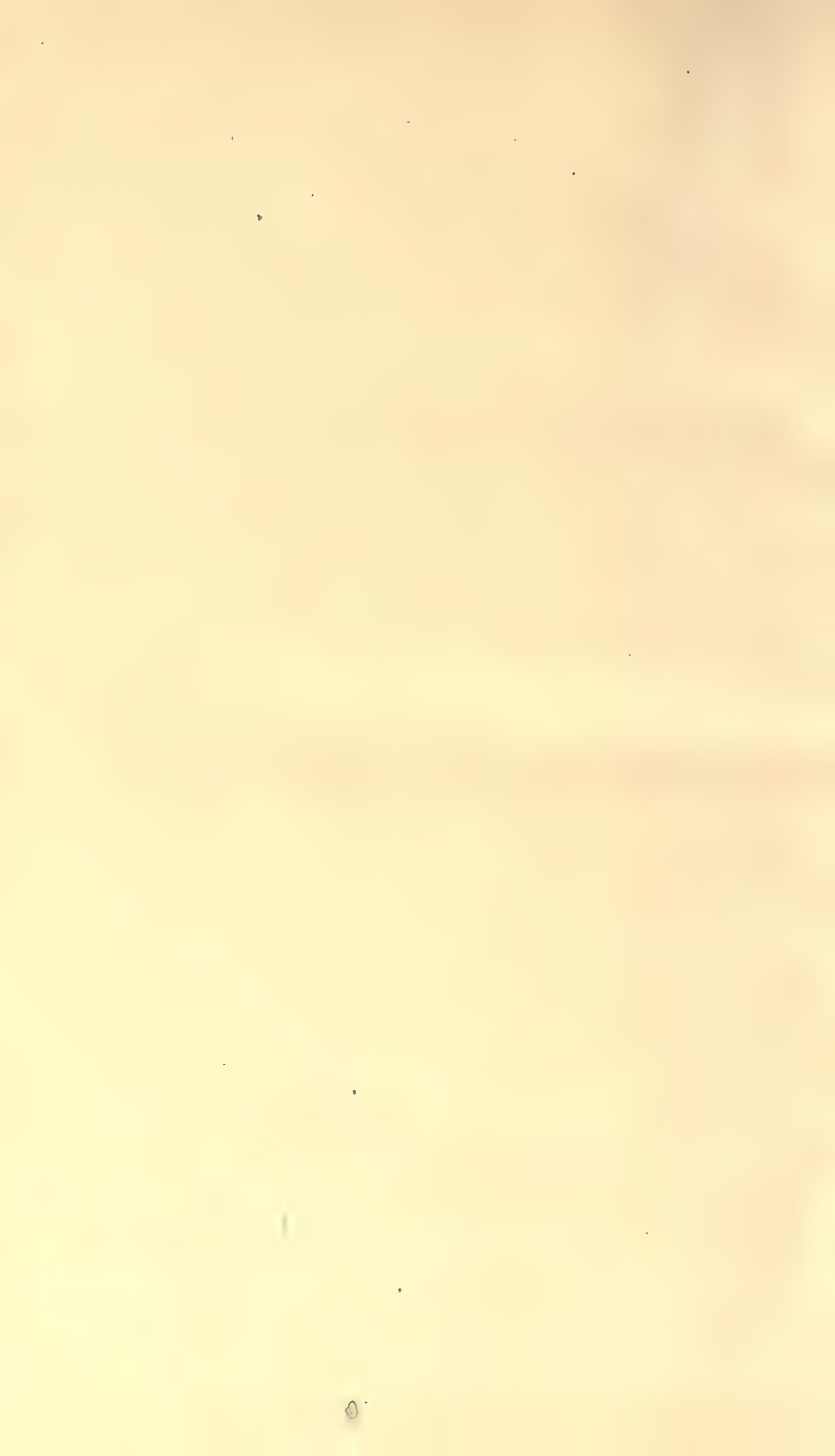
7. **WITNESSES—Impeachment.**—A defendant charged with burglary, and being examined as a witness, cannot be impeached by evidence that he has associated with lewd women. The question of his chastity has no bearing upon his veracity in such case. (Tex. Cr. Rep.) Hudson v. State, 789.

8. **WITNESSES—Impeachment of Defendant.**—If an accused has been examined as a witness, he may be impeached by showing that he has been theretofore charged with an offense involving legal or moral turpitude. The same rules apply to an accused as to any other witness sought to be impeached. (Tex. Cr. Rep.) Hudson v. State, 789.

See Deeds, 2; Evidence.

WRITS.

See Obstructing Justice.



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